LETTERS BY HISTORICUS.

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ON SOME QUESTIONS

OF

INTERNATIONAL LAW.

REPRINTED FROM 'THE TIMES'

WITH CONSIDERABLE ADDITIONS.

'So many encroachments have recently been made on the ancient course and maxims of the law of nations, that the primary object of importance now is to reinspire a deference to solemn precedents and established rules.'

FRANCIS HORNER.

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PREFACE.

I HAVE yielded to the opinion of those in whose judgement I place confidence in determining to publish these letters. I have done so with considerable hesitation, because I am profoundly conscious how far they fall below the standard of that which is adequate to the treatment of questions perhaps the most important with which politics or jurisprudence are conversant. The text-writer on international law assumes a noble task, but he at the same time accepts a grave responsibility. His speculations, if unsound, and his maxims, if unjustifiable, must too often be refuted by the sword. They furnish pretexts sometimes for unjust demands, at others for unrighteous refusals. Those who assume the authority of Publicists exercise, in some sort, the judicial functions of life and death. Like the Feciales of old, of whose office they are the legitimate heirs, they deal out the lots of peace and of war; and thereby, according as they guide or pervert the judgements of their age, they affect the destinies of nations and determine the misery or the happiness of whole generations of mankind. It is the immortal glory of Grotius through a new dispensation of international right, to have evangelised the society of nations brutalised by a licentious carnival of force. It has been the shame of others to have degraded the Palladium of Law into the minister of the temporary

passions of Governments and the servile instrument of the interests of States.

These fugitive pieces make no pretensions to a share in this noble work for which the labours of a life would be no excessive preparation. They assume to be nothing more than occasional observations thrown together in the intervals of business from such materials as lay at hand, in order to illustrate, in a popular form, clearly-established principles of law, or to refute, as occasion required, errors which had obtained a mischievous currency. The writer has not attempted any profound or scientific treatment of the questions they discuss, which would have been out of place in the columns of a daily journal, but has confined himself to establishing, by sufficient authority, propositions which have been inconsiderately impugned, and pointing out the various methods of reasoning which have led some modern writers to erroneous conclusions. If these papers have any merit at all, it is in the spirit in which they are conceived rather than in the manner in which they are executed. The object with which they have been written, is to offer a slight contribution towards that desirable end, the necessity of which is enforced in the wise sentence of that philosophical lawyer, Francis Horner, which I have prefixed to the title-page.—'The primary object of importance now is to reinspire a deference to solemn precedents and established rules.'

It will be seen that of the following papers those on 'Blockade,' 'Right of Search,' and 'Neutral Trade in Contraband of War,' are simple expositions from ordinary books of the admitted and unquestionable law upon these heads. The discussions on the 'International Doctrine of Recognition,' the 'Essential Qualities of Contraband,' and 'Belligerent Violations of

Neutral Rights,' are the only parts of this publication which attempt anything like original investigation. The notice of M. Hautefeuille's work attempts to point out, though very imperfectly, the erroneous sources from which that writer has sought to derive the institutes of international law, and also very slightly indicates the real basis of that jurisprudence. The letter on 'Intervention' is rather of a political than a juridical cast, but the present interest of the question gives it a place here.

An adequate work on the Rights and Duties of Neutral Nations, founded on a sound basis of historical investigation and judicial decision, has yet to be written. I have given my reasons at some length, in a subsequent paper, for holding the treatise of M. Hautefeuille to be vicious in its method, and unsatisfactory in its execution. The work of Dr. Phillimore, though laborious and impartial, is rather an indiscriminate digest of opinions, than a scientific investigation of the principles and practice of international law. The lectures of Chancellor Kent at the commencement of the Commentaries are a perfect specimen of juridical exposition. They are, however, too deficient in detail to supply the place of a practical treatise. The work of M. Ortolan is fair, trustworthy, and generally accurate, but makes no pretensions to a scientific treatment of the subject. The 'Elements of International Law,' by Mr. Wheaton, slight as they are, nevertheless present, on the whole, next to that of Kent, the best general attempt which has yet been made at a discussion of these questions. Nevertheless, on most questions of international law, the student has still to make for himself his own text-book; to extract from scattered documents the records of historical precedents; to deduce from judicial decisions the principles of established law; and, what is still

more difficult, to distinguish in contradictory text-writers the doctrines which are founded on reason and law from those which have their birth in inveterate prejudice or empty speculation. It is from these difficulties that ill-informed and shallow reasoners have been induced to question altogether the existence of the principles of international law. Yet this idea is about as reasonable as if a man who had neither the instruments nor the knowledge requisite to take an observation, should dispute the possibility of a science of astronomy.

Whilst on the subject of works upon these topics, I gladly take the opportunity of expressing my great obligations to Mr. Reddie for his valuable researches into the literature of this head of jurisprudence. His volumes are a perfect storehouse of learning and information, and he has the merit, rare in these days, of having pursued, under the advice of Sir J. Mackintosh and Mr. Horner—two sound opinions, if ever there were such—the true method of investigation. It will be seen that abundant use has been made of these volumes in the following papers. The defects in the arrangement of Mr. Reddie's writings alone prevent them from being among the most useful works on this subject which the present generation has produced. The treatise of Mr. R. Plumer Ward on 'The Rights and Duties of Belligerent and Neutral Powers,' is a perfect model of the method of discussion of disputed questions, such as arose in the case of the Armed Neutrality. His 'History of the Origin of International Law' shows how competent this accomplished writer was to treat these topics. Lawyers and statesmen have much occasion to regret that he abandoned the severe field of jurisprudence for the lighter paths of fiction. It would,

probably, have much astonished the author of these works to have been told that, after the lapse of half a century, whilst his romances are comparatively unread, it is hardly possible, so great is the request for them, to obtain a copy of his tracts. I must not omit to notice the 'Commentaries on International Law,' by Mr. Oke Manning, a very careful and useful work, and which, on the limited ground that it covers, is very accurate and full. It contains, perhaps, the most complete refutation of the sophistical reasonings and unfounded statements of Hübner and his disciples which has appeared.

But of all the sources of authority on these subjects, the most valuable—though unfortunately in this country not the best known—are the decisions of the American Courts. The policy of neutrality and peace which was, until the late unhappy events, the sacred tradition of the United States, has brought it about that the Rights and Duties of Belligerents and Neutrals have been more fully and minutely discussed in the jurisprudence of that country, than in that of our own. No praise too high can be awarded to a body of decisions which for learning, impartiality, logic, and good sense are unsurpassed in judicial annals. Nothing gives me greater confidence in maintaining the justice and equity of English practice than the knowledge that on all the great topics of international law, the voice of that which was once the chief neutral Power of the world is absolutely in accord with Great Britain, who, from various causes, has taken the lead among maritime belligerents. It will be seen that throughout the course of these papers I have largely availed myself of American learning.*

* I trust I may without offence take this occasion of appealing to the authorities of the Inn of which I have the honour to be a

In commenting in the columns of a daily journal upon questions of law which have immediately arisen out of those great events which are rending to pieces the entrails of America, and agitating to its inmost core the mind of Europe, it was impossible to adhere altogether to dry disquisition, and avoid some allusion to political considerations. I trust that in any remarks which will be found in these papers there may appear no spirit of partisanship with either of the conflicting elements in the terrible struggle which every wise and humane man must pray may be speedily terminated. I have professed—what I sincerely feel—a desire not only for a political but a moral neutrality in this deplorable strife. The principles of one party and

humble member on the subject of the serious defects of the library of the Inner Temple. In the year 1839 Mr. Manning, in his book, complains that he could not find there a copy of Schlegel's famous tract on Lord Stowell's judgement. The library a few weeks since did not contain a copy of it after the lapse of thirty years, though it is a work to be easily obtained. Last year there was no copy in the library of Mr. Ward's tract on Neutral Rights, published in 1801—I believe a copy has been procured within the last few days. Not even Lord Grenville's letters of Sulpicius are to be found there. The most ordinary works of reference, such as the American State Papers, the 'Pièces Officielles' of Schoell, and other works essential to any research in political jurisprudence, are altogether wanting. In fact, the Library is little better than a common practitioner's collection. For the purposes of investigation or study of any questions of general jurisprudence, it is absolutely useless. The library of the Inner Temple bears a lamentable contrast to the magnificent collection of Lincoln's Inn. I gladly seize this opportunity of acknowledging my obligations to Mr. Martin, the zealous and obliging librarian of the Inner Temple, who is the worthy son of a worthy father — the former librarian of Woburn Abbey. I only hope that the Society will place at the librarian's disposal the means which his knowledge and intelligence would enable him to employ to the best advantage, in order to make the collection what it is not now — creditable to the Society and useful to the profession.

the aims of the other seem to me alike so indefensible as to leave to the impartial spectator little room for sympathy with either. I rejoice that the English Government have proclaimed the policy of an absolute neutrality. I most earnestly hope that, through good report and through evil report—in spite of all solicitations, and in spite of every menace—they will religiously adhere to the only course which can bring credit to themselves or advantage to the country. We are told, indeed, that a policy of neutrality will bring us the hatred of both belligerents. It may be so; for, to men inflamed by passion and hatred, nothing is so odious as the spectacle of justice and fairness in others. It is said that neutrality is not popular in this country. I do not believe it; but if it were so, I hope that fact would not influence the policy of an English Administration on so critical a question. The quality by which statesmen are distinguished from the clamorous mob, and the title which they possess to govern the destinies of a people, lies in the power to look beyond the exigency of the moment, and to forecast the horoscope of the future. To be firm when the vulgar are undecided, to be calm in the midst of passion, and to be brave in the presence of panic, are the characteristics of those who are fit to be the rulers of men. Such men can bear obloquy and put aside vituperation, because they know that the time will come when their assailants themselves will feel—though perhaps not acknowledge—the wisdom of their acts, and that, in the return of moderation and good sense, justice will be done to the equitable policy of a true and faithful neutrality.

In the year 1818, in the debates on the Foreign Enlistment Bill, Mr. Canning held up to the imitation

of the English House of Commons the example of the Government of the United States at the outbreak of the Revolutionary War in Europe. I know no story in the page of history more striking or more instructive than the noble stand made by Washington and the great statesmen by whom he was surrounded, against the excited passions of his own countrymen, who sought to force the Government into hostilities with Great Britain. The narrative is told in the closing chapters of Marshall's 'Life of Washington,'—the worthy biographer of a noble life. No spectacle so sad or so memorable has been transmitted for the instruction of posterity as that of an ungovernable people who clouded, by their ingratitude, the closing days of the patriot chief who had led them through the wilderness and brought them into the land of promise. But those were days in which American statesmen had the courage to be wise, and dared to be unpopular. In the midst of almost universal obloquy Washington stood firm, and refused to adopt the rash and short-sighted policy of a frantic people and a violent press. He knew too well

> How nations sink, by darling schemes oppress,
> When vengeance listens to the fool's request.

I have spoken with the respect they deserve of the judicial records of American decisions. But an equal if not higher reputation belongs to the archives of American diplomatic statesmanship at the close of the last and the beginning of the present century. The published volumes of American State Papers during the early years of the French Revolutionary War present a noble monument of dignity, moderation, and good faith. They are repertories of statesmanlike principles and juridical knowledge. Their relation to the publications of

modern transatlantic politicians is much that of the literature of Rome under Augustus to that of the Lower Empire. Pressed upon either side by the violence and menaces of the rival combatants, Washington persisted to the last in an inflexible attitude of strict neutrality. The country over whose destinies he presided reaped the lasting advantage of his wise and prudent counsels. And the verdict of an enlightened posterity has indemnified his fame for the odium which was cast upon him by an unjust and ignorant populace. I trust that the administration which may be charged with the fortunes of this Empire, to whatever party they may belong, will sustain the same superiority above the solicitations of interested partisans and the clamour of ignorant passion.

CONTENTS.

		PAGE
I.	THREE LETTERS ON 'RECOGNITION'	1
	(1) The International Doctrine of Recognition	3
	(2) The Texan Precedent	17
	(3) The *Edinburgh Review* on Recognition	23
II.	A LETTER ON THE PERILS OF INTERVENTION	39
III.	SOME REMARKS ON A WORK OF M. HAUTEFEUILLE, entitled 'DES DROITS ET DES DEVOIRS DES NATIONS NEUTRES'	53
IV.	TWO LETTERS ON THE LAW OF BLOCKADE	87
	(1) England and Paper Blockades	89
	(2) Blockades by Cruising Squadrons	99
	(3) Note on the Origin of the Continental System	108
V.	TWO LETTERS ON NEUTRAL TRADE IN CONTRABAND OF WAR	119
	(1) Neutral Trade in Contraband of War	121
	(2) Insurance on Contraband Voyages	138
VI.	BELLIGERENT VIOLATION OF NEUTRAL RIGHTS	147
VII.	THE FOREIGN ENLISTMENT ACT	163
VIII.	A LETTER ON THE RIGHT OF SEARCH	173
IX.	SOME EXTRACTS FROM LETTERS PUBLISHED IN THE WINTER OF 1862 ON THE AFFAIR OF THE 'TRENT,' ON MR. SEWARD'S DESPATCH	185
	(1) A Letter on the Nature and Essential Requisites of Contraband of War	187
	(2) A further Letter on the same Subject	191
	(3) Extract from a Letter on Mr. C. Sumner's Speech on the Surrender of Messrs. Slidell and Mason	194
X.	A PAPER ON THE TERRITORIALITY OF THE MERCHANT VESSEL	199

THREE LETTERS ON THE INTERNATIONAL DOCTRINE OF 'RECOGNITION.'

THE following Letters contain an attempt to ascertain the true principles by which the recognition, on the part of foreign Governments, of insurgent communities, is governed. It is a subject on which but little precise information will be found in the ordinary text-books.

I.

THE INTERNATIONAL DOCTRINE OF RECOGNITION.

THE principles involved in the question commonly termed the 'Recognition of the South' seem to be so imperfectly apprehended by some recent writers and speakers, and so much confusion appears to exist in the public mind respecting this interesting topic, that I venture to ask your indulgence in an attempt to elucidate the maxims of law and the practice of nations applicable to the matter.

Nothing is more common than to confound, and yet nothing is more important than to distinguish, in this discussion, that which strictly belongs to the province of law, and that which properly pertains to the domain of policy. Policy might possibly suggest that which law nevertheless disallows; and, on the other hand, law might permit what policy, notwithstanding, would dissuade. With the question of policy I do not purpose, except incidentally, to deal. I will, however, ask your leave to indicate the outlines which circumscribe the law of the case.

The general principle which underlies and forms the *substratum* of the whole discussion is the fundamental doctrine of the respect exacted by International Law for the independence of sovereign States. Each State is bound in its international relations to observe and respect the sovereignty, however symbolised, of every other State. Sovereignty, by the very definition of the term, implies a right to the obedience of subjects, whether the Sovereign be a despot, a monarch, or a republic. A breach of this obedience is a violation of this right. Revolution must always be a violation of Right, though it may sometimes be the consummation of Justice. But no political sect that I know of, except the Red Republicans, have ever maintained the doctrine of the *primâ facie* legitimacy of Rebellion, which would be nothing less than what has been called the

'Right of Insurrection.' Upon such a principle all Government is impossible, since it would be denied even the primary right of self-defence. To deal with the insurgent subjects of another State on a footing of independence, is to violate the sovereignty of the State which has hitherto exercised dominion over them. As long, then, as persons once owning the relation of subjects to a sovereign State are still capable of being regarded in any sense as such subjects, to deal with them upon an independent footing is a hostile act towards that Sovereign which, according to the principles of International Law, may be justly resented. On the other hand, if persons who once owned the relation of subjects have been able, either by force of arms or otherwise, to divest themselves, in a final and permanent manner, of the *status* of subjects, then diplomatic transactions with such persons afford no justifiable ground of offence to their former Sovereign, nor can they be regarded as a breach of neutrality or friendship.

As generally happens with all questions of law, the principle itself is sufficiently clear, but the difficulty lies in its application. When does a subject cease to be a subject? is a question of mixed law and fact which is not very easy of solution. The answer is to be looked for rather in the recent and approved practice of nations than in any definitions of text books. The old theory of *de jure* and indelible sovereignty which led Louis XIV. and the non-jurors to persist in asserting the sovereignty of the Pretender, is now universally abandoned. The sufficiency of a *de facto* independence is admitted by common consent. But still remains the difficult question, What constitutes *de facto* independence?

In 1849, the people of Hungary proclaimed their independence, and for some time asserted it with considerable success by force of arms. Indeed, so enfeebled at that time were the military resources of the Austrian Government, that for a certain period her authority in the Hungarian provinces was wholly set aside, and it was only by the assistance of a foreign power that she was enabled to reinstate her dominion. In this state of things the American President despatched a special envoy to Kossuth, with instructions* not only to enquire into

* *Vide* Note at the end of this Letter.

the *status* of the Revolutionary Government, but with full powers at his discretion to recognise and to treat with it. Yet by the general opinion of Europe this transaction was severely reprobated; and the American executive, though they blustered a good deal *more suo*, did not ultimately pretend to justify or insist on this course. It was properly considered, that, though the Revolutionary Government was temporarily in complete possession of the territory to which they laid claim, a greater lapse of time was necessary in order to give prescription to the tenure. It was thought that their success, though remarkable, might not be permanent; and the proceeding of the American Government was pronounced not justifiable, and proved in fact at once offensive and nugatory.

The modern precedents which have been alleged by those who recommend the immediate recognition of the Southern Confederacy, display, in a conspicuous manner, the confusion of the public mind on the question at issue. I observe that a Member of Parliament, in a recent speech, relies upon the instances of Belgium and Greece as conclusively settling the head of legality; yet, in truth, Belgium and Greece have nothing whatever to do with the matter in hand. If the hon. gentleman had been recommending a collective European intervention to settle with a strong hand the disputes between the American belligerents, Belgium and Greece might have served as apposite illustrations. But to cite the action of the European powers in the affairs of Belgium in 1830 as a case of *recognition*, betrays a total ignorance of facts, and an entire confusion of principles. The Conference of London did not, nor did it profess to, *recognise* the independence of Belgium; its avowed object was to *create* the independence of Belgium. Anyone who will be at the trouble to examine the history of that transaction, will see that Belgium did not pretend, nor did anyone assert on its behalf, that it had achieved a *de facto* independence. On the contrary, it is perfectly notorious that after the battle of Louvain, the Dutch army, but for the armed interference of France, would have reoccupied Brussels. The powers of Europe, which in 1815 had assigned Belgium to the Crown of Holland, thought themselves entitled in 1830, in the same European interest, to recast their own plan. The case of Belgium was, therefore,

not one of *recognition*, but of *intervention*, and is, consequently, wholly impertinent to the present discussion. The interference of the Conference was clearly a hostile act towards Holland, quite inconsistent with neutrality between the combatants; and was one which, if that power had had either the will or the force, it would, undoubtedly, have been justified in repelling by arms. But the Conference, confident in its own strength, took upon it a risk which it knew to be inconsiderable, in order to accomplish a settlement which was regarded as essential to the peace of Europe. If the speaker in question meant to recommend that the great powers of Europe should interfere by force to compel the North to acquiesce in the secession of the South, he might perhaps derive some assistance from the history of Belgium; but if he wanted an instance of a state of things where *recognition* affords no just ground of offence to the former Sovereign, and which cannot be regarded as a hostile act by a friendly power, the instance of Belgium was wholly beside the question.

The case of Greece is precisely similar to that of Belgium. Greece never achieved a *de facto* independence; on the contrary, at the moment of the European intervention, the Greek patriots were on the point of succumbing. The European Powers did not *recognise*, they *saved* Greece. As a matter of European policy, they thought fit to act in a manner decidedly hostile towards Turkey. The battle of Navarino may have been an 'untoward event,' but it was the natural and almost inevitable consequence of a forcible intervention to prevent the Turkish Government from reducing its subjects to submission. The emancipation of Greece, effected by Europe, was a high act of policy above and beyond the domain of law. As an act of policy, it may have been, and probably was, justifiable; but it was not the less a hostile act, which, if she had dared, Turkey might properly have resented by war.

There is, however, another example a good deal more to the purpose, viz. the celebrated recognition of the South American Republics by Mr. Canning. This was a true case of *recognition*, and not of *intervention*. The English Government did not pretend to coerce or dictate to Spain. Its action professed to be, and was, in all respects, that of which a friendly Government

had no just cause to complain, and was perfectly consistent with an attitude of neutrality. This, then, is the very case which those who wish to *recognise* the South, and yet not to *intervene* in the American quarrel, will do well to consider. What, then, was the state of things in the Spanish-American colonies at the time that the English Government thought itself justified in entering into diplomatic relations with them? In the first place, it is to be observed, that the resistance of the insurgents to the Spanish authorities had been protracted for nearly twenty years. Over and over again the Government of Spain had itself invoked the mediation of Europe. In Buenos Ayres and Columbia, Spain had entirely abandoned even an effort to establish its authority by arms. In Peru, a certain though hardly doubtful struggle was still subsisting between the mother-country and the insurgents. Buenos Ayres alone, the soil of which had been free for fourteen years, and had at last acquired a permanent Government, was selected in the first instance for recognition. Though the contest had ceased in Columbia, yet, as that State had perilled her position by detaching all her forces in aid of the Peruvian insurgents, the recognition was postponed, because there appeared still a possibility that the war and the Spaniards might have been brought back into the heart of the country. The recognition of Chili and of Mexico was likewise deferred, on account of the uncertainty of their situation, and the character of their Government. In the case of Peru, where something which could be called a substantial struggle was still being carried on, the question of recognition does not seem to have been thought capable of being even entertained.

The principles to be deduced from this transaction are clear and intelligible enough. Where the Spaniards had practically abandoned the struggle to reestablish their sovereignty, the State, the independence of which was thus established *de facto* beyond the probability or almost the possibility of reverse, was admitted to be entitled to recognition. Where a partial contest was still sustained, as in Peru, it seems to have been taken for granted that recognition was inadmissible. While the issue can be still considered in any degree *in ambiguo*, the presumption is necessarily in favour of the former Sovereign. And a friendly

State is bound to exact very conclusive and indisputable evidence that the sovereignty of a government with which it has existing relations over any part of its former dominions has been finally and permanently divested. It is not a liberty during the pendency of an actual struggle to speculate on the result, or to assume the probability of the ultimate failure of the ancient Sovereign, however plausible may be the grounds for such an inference. What the claimant to recognition has to show is an accomplished and *de facto*, not a probable or *paulo post futurum* independence. This I believe to be the accurate rule of international law, and it is that which was laid down by the Secretary of War in his much-canvassed speech at Hereford. The position insisted upon by Sir G. C. Lewis seems to have been much misunderstood by those who have criticised his doctrine. He is supposed to have maintained that England would not be entitled to recognise the Southern Confederacy until the Federalists had previously done so. But the Secretary of War is far too accurate a thinker and speaker to have laid down any such doctrine. The rule he propounded was precisely that acted upon by Mr. Canning in the case of the South American Republics, viz. that where a doubtful and *bonâ fide* struggle for supremacy is still maintained by the Sovereign power, the insurgents *jam flagrante bello* cannot be said to have established a *de facto* independence.

Anyone who will be at the trouble to study the profound and luminous speech of Sir J. Mackintosh on this subject (*Miscellaneous Works*, vol. iii.) will see (p. 462) how essential he thought it to his argument to establish that all substantial struggle for sovereignty on the part of Spain had ceased. The speeches of Lords Lansdowne and Liverpool, in the House of Lords, entirely confirm the same view. And assuredly the reasons, which in 1824 operated against the recognition of Peru, may be more forcibly applied to the present condition of that which, in common parlance, is termed 'the South.' It cannot with any show of reason be pretended that a too substantial struggle is not still being waged in America. The ancient sovereign has been ejected but not dispossessed. The disseisor has not acquired an 'adverse possession,' nor has the original owner ceased to urge by arms a 'continual claim.'

It will be seen from the foregoing remarks how little practical bearing the precedents of Belgium, Greece, or South America have upon the existing state of the quarrel in the United States. There is, indeed, an example much more nearly resembling the case under discussion where a foreign power thought fit to enter into diplomatic relations with a body of insurgents, while the sovereign State was still engaged in a flagrant contest for the reestablishment of its supremacy. I allude, of course, to the treaty of commerce negotiated by the Court of France in 1778 with the English colonies in America. As far as our own authority can go, it was decisively established that such conduct was unlawful, and afforded a justifiable cause of war. The grounds of the English declaration of war are set forth in the message of the King to Parliament, and are rested solely on the fact of recognition and the treaty of commerce. England treated the negotiation of a treaty of commerce with the insurgent colonies, while she was still engaged in a contest for their subjugation, as a lawful cause of war, and I think that her right to do so was indisputable. That France anticipated that her conduct would be so treated is apparent enough from the fact that she thought it expedient at the same moment to conclude with the insurgent colonists a secret treaty of defensive alliance, in contemplation of hostilities with Great Britain. This latter treaty was not communicated at the time the war was declared, and was not, as has sometimes been supposed, the ground of hostilities.

As far, then, as any practical rule can be deduced from historical examples it seems to be this—When a sovereign State, from exhaustion or any other cause, has virtually and substantially abandoned the struggle for supremacy it has no right to complain if a foreign State treat the independence of its former subjects as *de facto* established; nor can it prolong its sovereignty by a mere paper assertion of right. When, on the other hand, the contest is not absolutely or permanently decided, a recognition of the inchoate independence of the insurgents by a foreign State is a hostile act towards the sovereign State which the latter is entitled to resent as a breach of neutrality and friendship. The true rule is that laid down in the old distich. Rebellion, until it has succeeded, is Treason; when

it is successful, it becomes Independence. And thus the only real test of independence is final success.

I now pass to another very perplexing branch of the question, to which it seems to me that public attention has not been sufficiently directed. It is very well in ordinary conversation to talk of the 'recognition of the South.' But when it comes to taking diplomatic action, all the evils of a loose phraseology are apparent, and the necessity of precise definition becomes urgent. Before you can recognise a State you must know what it is. Now, I have never seen on the part of the advocates of the immediate recognition of the South, any attempt to define what 'the South' is, what is its extent, or where the line of demarcation is to be drawn. Is 'the South' which we are to recognise to include the Mississippi and New Orleans? If so, what is to become of its *de facto* independence while the Federal gunboats hold the former, and a Federal army is in possession of the latter? Is Kentucky North or South? Which is Virginia, and what of Tennessee? 'The South' at present is a cloud, apparent enough and sufficiently menacing, but still a cloud, varying in size and shape with every victory and every reverse, and never presenting the same outline for two mails together. Who, then, is to settle this question of limits? The belligerents have not yet been able to define it by their arms. Is it we, then, who are to determine what is that 'South' which we are called upon to recognise? In the case of a forcible intervention like that in Belgium and Greece, the thing may be done, and accordingly in those cases it was done by force of arms. The powers of Europe made up their minds what should be the limits of Belgium and Greece, and they compelled Holland and Turkey to acquiesce in their decision. Have we made up our minds what the 'South' ought to be—whether it is to include the territories and the border States, for instance? And, if so, are we prepared to compel the acquiescence of the Government of Washington in our new map of North America? It may perhaps be said that we have already recognised 'the South,' with all its vagueness, as a belligerent. But the two cases are obviously quite distinct. Belligerency is a temporary fact, capable of being treated roughly and in the lump. Whereas

recognition has to do with a newly created *status* of sovereignty, which, being in the nature of a permanent right, necessarily supposes the attribute of exact metes and bounds.

It is quite clear that one of the most essential elements in the *status* of the claimant to recognition is that its limits should be intelligibly defined. I do not say that the boundary line need be laid down with scientific accuracy, but, at all events, that it should be understood in a much clearer manner than it can be yet said to be defined as between the South and the North. It may be suggested that 'the South' embraces all the States which have passed a secession ordinance; but it is obvious that a paper independence is of no more value than a paper supremacy, and that the South is no more independent at New Orleans or in Tennessee than the North is supreme at Richmond or in the Carolinas. The ordinary diplomatic basis of the *uti possidetis* here entirely fails, for the South would be as little disposed to abandon all that it has lost since the commencement of the war, as the North would be to leave it all that it has gained. This question of boundary is the real crucial test. It is a knot which the sword of the combatants alone can unloose. We cannot undertake to untie it. Yet, till it is resolved in some way or other, there can be no practical question of recognition.

Another argument in favour of recognition has been sought, more plausibly than logically, in the doctrine of the original sovereignty of the several States. Like most fallacious reasonings, this pretext has the capital fault of proving too much. It is introduced to supplement and eke out an insufficient case, when, in fact, if it were well founded, it would be sufficient in itself, without any adjunct. If South Carolina is and always was an independent sovereign State, no struggle for independence was necessary antecedently to her recognition by the European powers. In this view of the case she might at any time, without an effort to throw off the yoke of the Federal Union, have negotiated a treaty with England. And Charleston, for instance, might have proclaimed a free trade tariff while the Government of Washington was exacting a protective duty. Can it be pretended that if the Federal Government had declared war against a European power any particular State—say Georgia, for instance—could have declined to take

part in hostilities, and have claimed to be treated by the belligerent United States as a neutral power? The consequence of this reasoning seems absurd, and yet the argument must go this length, or it is good for nothing at all. The truth is, that from the time that the States chose, for their own interests, and in order to enhance their own importance, to organise and present themselves to the world as a collective Federal Government, foreign nations have ceased to have anything to do except with that Government which, for the purpose of all foreign relations, the States themselves constituted their representative and plenipotentiary. Foreign Governments can take no more cognisance of the internal relations of the States to the Federal Government than they can of the provinces of Austria or the departments of France. It must be perfectly obvious to every reader of the admirable disquisitions in the 'Federalist,' that the express object of the Federal union was to do away with the state of things which this argument assumes to exist. We certainly could not have allowed foreign Governments to speculate on our tenure of Hindostan, or to base their action on Mr. O'Connell's views of the validity of the Irish Union. It is strange that those who insist on this argument do not see that it is absolutely fatal to the recognition of 'the South.' If the States are to be recognised on account of their original sovereignty, it is the several States, and not the Southern Confederacy, which must be recognised. If they are not to be bound, as regards foreign powers, by their old articles of federation, why is the new Confederacy to be more obligatory? This doctrine, if it proves anything at all, demonstrates conclusively that 'the South' is only a partnership dissoluble at pleasure, and is not a Government of such a stable and permanent form as any foreign State could or ought to recognise.

It is sometimes said that the question of recognition is one of policy—and this is true, if considered with respect to the community which has recently asserted its independence. With respect to such a community, foreign powers have as yet contracted no duties similar to those which are incumbent on them in reference to established Governments with whom they have already entered into relations. It is entirely a matter of discretion and policy how, and how soon, they will admit such

communities into the society of nations of which they are themselves members. It has always been considered highly expedient, as soon as the *de facto* independence of a particular people is clearly established, to recognise its Government, for the reasons so forcibly stated by Mr. Canning, in the case of the South American Republics. It is desirable that foreign Governments should establish diplomatic relations with the authority to which such a people pay practical obedience, in order that they may be the means of obtaining redress for any international injuries which may from time to time be committed. But this reasoning must not be pushed too far nor applied too early. All States in a condition of civil war are necessarily, to some degree, exposed to this inconvenience. During the war in La Vendée, the insurgents did not admit nor obey the authority of the Government of France. For a considerable time before his execution, Charles I. could not have redressed international wrongs committed by the forces of Cromwell. When the Pretender was at Holyrood, it would have been in vain to have applied to the King of England for compensation for offences committed in the Firth of Forth. It is not till this state of things has become chronic that it affords a real and pressing ground for recognition. And all prudent and moderate Governments have acted on this principle. The Government of the United States alone has exhibited habitually a less decent decorum in the haste it has shown to tread upon the heel of sovereignties whose last agony of dissolution is hardly consummated. It is not true, however, in the meanwhile, that foreign powers are entirely without the means of redress against the persons owning the allegiance of the new and inchoate Government. The recognition of the insurgents as belligerents gives them quite a sufficient personality to enable foreign powers to address to them remonstrance, and to receive at their hands satisfaction. A semi-official correspondence actually took place at the beginning of the strife in America between the English Foreign Office and President Davis, on the subject of the rules to be observed towards neutral nations in the maritime war that was about to be waged. The despatches of the Consul at New Orleans on this subject were presented to Parliament last session. And there can be no doubt that if

the Government of this country had any cause of complaint against the Confederate belligerents — as, for instance, for a breach of the Foreign Enlistment Act—they could make representations through the same channels, and, if necessary, enforce their rights by reprisals or otherwise. A Government which is sufficiently incorporated to enjoy the rights of a belligerent cannot be suffered to evade the correlative duties which are incumbent upon it.

There is only one other point upon which I will venture further to task your patience. There are many persons who perceive and feel the difficulties and obstacles to a formal recognition of the South, but who think that intervention in the form of mediation, whether friendly or forcible, might still be tried, in order to put a stop to this horrible strife. Intervention is a question rather of policy than of law. It is above and beyond the domain of law, and when wisely and equitably handled by those who have the power to give effect to it, may be the highest policy of justice and humanity. But in order to this, it is obviously necessary that those who are to intervene should know and be able to declare what they are prepared to enforce, or that those who offer to mediate should be in a position to state what they propose to recommend. In the cases of Belgium and of Greece the powers of Europe knew very well what they intended to accomplish, and they effected their purpose. When Louis Napoleon intervened in Italy, he had a policy which he more or less carried out. But if Europe is to intervene in America, either by mediation or otherwise, what is the view on which she proposes to act? Whatever may be thought of the original causes and motives of the American quarrel, it is obvious enough that in its final solution the question of slavery must in some form or other be dealt with. Its limits must be defined and its conditions determined. What scheme are the great Powers prepared to recommend or to enforce on the subject of slavery which 'the South' would accept, and which would not shock the conscience of Europe? Is Europe prepared with a substitute for Mason and Dixon's line, or has it settled a new edition of the Missouri Compromise? Yet if we are to mediate, it can only be by urging some plan which we approve. What is that solution of the

negro question to which an English Government is prepared to affix the seal of English approbation? If the combatants settle the question for themselves, we can accept the result, whatever it may be, and however little we may approve it, without responsibility. If the matter is to be negotiated through our mediation, we must lend our moral sanction to the settlement at which we assist. There are many things which we cannot help, but there are some things with which it were wise to have nothing to do. And to this latter category I venture to think most eminently belongs the definition of that permanent line of demarcation which must, no doubt, one day separate the Slave from the Free States of America.

NOTE.

The following passages are extracted from the instructions of the American Secretary of State to Mr. Dudley Mann, the emissary to the Hungarian Revolutionary Government, dated June 18, 1849.

The object of the President, as I have said, is to obtain information in regard to Hungary and her resources and prospects, with a view to an early recognition of her independence, and the formation of commercial relations with her. Your large experience in European affairs, and the eminent ability which distinguishes your correspondence with this department, inspire the President with great confidence in your opinions; and for that reason, he feels no reluctance in leaving these delicate and important duties almost wholly to your discretion and prudence. You will decide upon your own movements and places of destination, as well as upon the particular points of enquiry to which you will direct attention; upon the proper mode of approaching M. Kossuth and his confidential advisers, and upon the communications which you may deem it proper to make to them on the part of your Government. Future instructions to you will depend in a great degree upon the reports and representations which you may, from time to time, communicate to this department.

In the meanwhile I transmit herewith a sealed letter, introducing you in your official character to the Minister of Foreign Affairs of Hungary; and an open copy of the same, which you will be at liberty to deliver or to withhold, as, under circumstances, you may deem proper and expedient. Before you can reach Pesth, or the seat of the Provincial Government in Hungary—wherever that may be—the whole scene may be changed, and it may even become improper for you to make any demonstration. In this case, and indeed in all other cases, you will be governed by your own good judgement and by circumstances.

Should the new Government prove to be, in your opinion, firm and stable, the President will cheerfully recommend to Congress, at their next session, the recognition of Hungary; and you might intimate, if you should see fit, that the President would in that event be gratified to receive a diplomatic agent from Hungary in the United States, by or before the next meeting of Congress; and that he entertains no doubt whatever, that in case her new Government should prove to be firm and stable, her independence would be speedily recognised by that enlightened body.

I transmit herewith full powers for concluding a commercial convention, if it shall be practicable to form one, conformably with the foregoing instructions.

II.

THE TEXAN PRECEDENT.

In the month of November I had the honour of addressing to you a letter in which I endeavoured to investigate the principles of international law which are involved in the question of the 'recognition' of insurgent provinces. For the purposes of that discussion it became necessary to examine the precedents which had been popularly alleged as bearing upon the subject. I showed, I think satisfactorily, that the cases of Belgium and Greece had nothing to do with the question of recognition. I further proceeded to examine the instance of the South American Republics, which exhibited a true case of 'recognition' properly so called, and I demonstrated the principle of the law of nations established in that case to be that recognition of a community which has severed itself from its ancient Sovereign is not permissible until its de facto independence is established; and further, that both in practice and in principle, it has been clearly defined that the only legitimate test of the establishment of de facto independence is the *cessation of a substantial struggle* on the part of the former Sovereign to assert his authority.

The advocates of the immediate recognition of the Confederate States seem to have felt the pressure of the argument and to have virtually abandoned the precedents on which they formerly relied. Their industry and zeal have, however, furnished them with yet another authority, which I fancy on examination will not be found to serve their turn more effectually than those which preceded it. As I have nowhere seen a full and accurate statement of the facts of this case, I shall in the first instance make your readers acquainted with them, and then proceed to investigate their bearings on the question under discussion.

Early in the year 1836, the population of Texas rebelled

against or seceded from the Government of Mexico. The Mexican President, Santa Anna, himself took the field at the head of a considerable force, in order to reduce the rebellious province to submission. The Texans, with the aid of their allies, the American squatters, in the month of April 1836, defeated the Mexican army in the decisive battle of San Jacinto, in which Santa Anna himself was taken prisoner. After this 'crowning victory' of the insurgents, the Mexicans were never in a position to make a serious or substantial military effort to regain their ascendancy. The following account of the position of the two parties in the summer of that year is taken from the *Annual Register* for 1836, p. 449:—

A new army was assembled to the number of about 4,000 men, but it was, and continued to be, in such a state of destitution that it was soon reduced by desertion and disease to little more than half that number. Mexico *being thus impotent in the meantime to assert her lost authority, Texas proceeded undisturbed* to exercise its powers of sovereignty.

The Mexican army shortly afterwards retired, and evacuated the Texan territory. On May 14, Santa Anna, the captive President of the Mexican Republic, signed a secret treaty with the rebel President of Mexico, stipulating for the recognition of Texan independence; and Mr. Kennedy, in his *History of Texas* (vol. ii. p. 236), says, 'The campaign of 1836 terminated with the battle of San Jacinto, which sealed the independence of the Republic.' It is clear, then, that at Midsummer 1836 all *substantial struggle* on the part of the Mexicans was at end.

The account of the military position of affairs given in the French *Annuaire* for 1837 is precisely to the same effect.

Quant au Texas, malgré toutes les déclarations du Gouvernement Mexicain sur la nécessité de faire rentrer cette province révoltée dans le devoir, *il lui fut impossible de diriger contre elle aucune opération sérieuse pendant toute l'année.* Un corps d'armée vint, il est vrai, parader pendant quelquetemps sur la frontière du Texas; mais soit défaut de subsistence, soit que le Gouvernement en eut besoin dans l'intérieur, ce corps ne tarda pas de se retirer, dès lors les Texiens pûrent se considérer comme à l'abri de toute attaque du côté de la terre.

In this state of affairs the Texans sought to obtain a recognition of their independence, both at the hands of the great

powers of Europe, and also more especially from the Government of the United States. The Cabinet of Washington, who already coveted Naboth's vineyard, were nothing loth. Indeed, it is more than suspected that the Texan Revolution was, from the commencement, a device of Southern politicians to secure a new Slave State, which should give them a counterpoise that became every day more necessary against the growing influence of the North. So hostile was the attitude and language assumed by the Government of the United States, that I know not whether the whole transaction does not rather partake of the character of an adverse intervention than of a neutral recognition. What took place subsequently is described in the *Annual Register* for 1837, from which the following passages are extracted :—

On the 18th of February, 1837, the Committee of Foreign Relations brought up two resolutions in Congress on the subject of Texas. The first of these resolutions declared 'that the independence of the Government of Texas ought to be recognised;' the second, 'that the Committee of Ways and Means should be instructed to provide, in the Bill for the civil and diplomatic expenses of the Government, a salary and outfit for such public agent as the President may determine to send to Texas.' The consideration of this report when brought up was *postponed* by the House of Representatives, but in the course of the session a Bill was passed appropriating a salary to a Texan Chargé d'Affaires, and to take effect *so soon as the President, having received satisfactory information of the independence of Texas,* should deem it expedient to fill up the office. Accordingly, the President did not neglect to take advantage of this vote, and one of the last acts of his administration was the appointment of a person to this contingent office. A spirited protest was presented by the Mexican Minister for Foreign Affairs. It began by stating that the Mexican Minister to the United States having, on the motion made in the Senate to recognise the independence of Texas, suggested by the defeat suffered by the Mexican arms on the 21st of April, called the attention of that Government *to the rights of Mexico and its means of enforcing them,* was informed by Mr. Forsyth, the Secretary of State, that he was instructed by the President to assure him that the Government of the United States would come to no decisive resolution on the question which should not be based on *the rules and principles which guided its conduct during the disputes which existed between Spain and the Hispano-American States.* These or other arguments seem to have induced at least a temporary forbearance on the part of the American Government. *Before the close of the year the Texan agent at Washington was informed that no negotiation on the subject of the independence of Texas could be opened as long as war continued to prevail between that province and the Mexican Republic.*

If this could be relied on as a perfectly accurate account of

the transaction, the precedent of Texas would certainly be the strongest conceivable example of the rule for which I have contended—that recognition is not permissible till the contest is over. I do not feel justified, however, in insisting on the details of this account so much as I might otherwise have done, because it does not appear quite reconcilable with the statement of Mr. Kennedy (vol. ii. p. 286), that 'on the 3rd of March 1837, the last day of President Jackson's official existence, he signed the resolution of the Congress of the United States, for the acknowledgement of the independence of Texas;' and I think it possible that the writer in the *Annual Register*, in the latter part of his narrative, may have confounded the two distinct questions of Recognition and Annexation. I will therefore assume that statement to be correct which is the least favourable to my argument, viz. that the recognition of Texas by the United States was complete on the 3rd of March 1837. The French Government, who had less interested motives for precipitation, though they had a little quarrel, on their own account, with Mexico, deferred the recognition of Texas till 1839; that by England was postponed, with still greater caution, and greater propriety, till 1840.

This being the true version of the facts of this case, permit me to ask in what respect it invalidates the rule for which I have contended? In May 1836, all substantial struggle between Mexico and Texas was at an end. This precedent, then, is an illustration of rather than an exception to the principle that the true test of the establishment of de facto independence is the virtual cessation of the struggle. The contest between Mexico and Texas being substantially at an end after the battle of San Jacinto, some foreign Governments were more quick, and some more slow, according to their various ethics and interests, in availing themselves of the right of recognition, which had then clearly accrued. Whether President Jackson was more right to act in 1837 than was Lord Palmerston to postpone the recognition of Texas till 1840, I do not much care to discuss. The only point on which it is material that I should insist is, that at the time of the recognition by the United States, no bonâ fide contest was going on between the insurgent province and its former Sovereign. We may, therefore, dismiss the Texan

precedent; and I think the advocates of recognition have not much mended their case, by adducing a precedent the moral of which is decisively adverse to the claim they desire to support. It is simply idle to allege such an instance as this as an authority for recognition in a case where such battles as that of Murfreesborough are still being fought, and where the other party still maintains, in the heart of the insurgent dominions, such military positions as New Orleans, Nashville, and the line of the Mississippi. The South has yet to win its battle of San Jacinto, before it can rely on the Texan precedent. When it has captured President Lincoln, and the North have failed to recruit another army, the cases will be more nearly parallel.

Permit me, before I quit this topic of precedents, to make one remark, which the line of argument adopted by certain writers seems to call for. If the conduct of the American Government, in the case of the recognition of Texas, had been —as, however, I think it was not—a transgression of the strict rule of international right, I should wholly refuse to admit that other nations are thereby justified in governing their conduct by a vicious example. *Exemplar vitiis imitabile* is not the canon of Public Law. I trust that the august structure of the *jus inter gentes* rests upon some worthier basis than a reciprocation of *tu quoques*. England committed that error once in the too celebrated instance of the Orders in Council; and the judgement of posterity has severely, but justly, rebuked a policy which I trust no provocation will ever induce us to repeat. It is for this reason that I have condemned the behaviour of the Government of the United States in the case of the Hungarian Revolution, rather than recommended it for imitation. It appears that the American Government had absolutely invested their emissary, Mr. Mann, with authority to recognise the insurgents at his discretion. The offence on their part, as against the Austrian Government, may, therefore, in spite of their subsequent disavowal, be said to have been complete. But what is the conclusion to be drawn from this indefensible transaction? I do not envy the ethical or juridical conceptions of those persons who see in a violation of right nothing but a favourable occasion for creating a precedent by estoppel. On the international record the estoppel is always at large. And nothing

ought to hinder but that the very right of the matter should be averred. The rule of law is Right, not Retaliation. If it were otherwise, every new act of wrong would at once beget and justify another, till injustice and violence multiplied in a geometrical progression, and the whole fabric of international equity would dissolve in a miserable chaos of anarchy and vengeance. If such a policy were adopted, it would be the practice of the least righteous nations that would establish the rule of Right. I have not so read the Law of Nations. If such be its Institutes, it is unworthy the respect of the jurist or the obedience of the statesman.

The doctrine of English statesmen on this subject has been uniform and distinct. They have maintained the illegality of recognition during the pendency of the struggle, not only when it was their interest to deny, but also when they were sincerely desirous to accord it. This being so, I cannot consent to treat a question on which may hang the issues of peace and war by an appeal to the *argumentum ad Americanum.*

III.

THE *EDINBURGH REVIEW* ON RECOGNITION.

I OBSERVE that a writer in the current number of the *Edinburgh Review* has criticised the doctrine which I ventured to lay down on the subject of 'Recognition,' in a letter which I addressed to you on the 4th of November last. The Reviewer contends that the question is one of policy entirely, and not of right. Upon this point, though I entertain the most sincere respect for his opinion, I cannot by any means concur in his reasoning or admit the facts on which it is founded. I am in a condition to support the propositions for which I have contended from the mouth of an authority which I am sure the Edinburgh Reviewer will admit to be entitled to the very highest consideration. I referred in my former letter to the speech of Lord Lansdowne, in the House of Lords, on the subject of the recognition of the South American Republics—a speech evidently most carefully considered, and replete with that wisdom, knowledge, accuracy, and moderation which are characteristic of an English statesman, who, in the maturity of his courteous wisdom*, still represents to an age which he adorns the '*mitis sapientia Lælii*.' The following passage from this remarkable and admirable performance is so important and so pertinent that I make no apology for quoting it in extenso :—

MY LORDS,—It is with respect to countries such as I have described that your Lordships are now called upon to determine whether you will advise

* This letter was written a week before the death of this eminent and lamented statesman. The writer little thought that he was thus paying a last tribute of respect to one for whose character he entertained so high an admiration, and of whose personal kindness he must ever cherish the most grateful recollection.

the Crown to recognise them in the form of independent States—a question which, be it recollected, involves a twofold consideration—*first, whether you possess the right to make this acknowledgement;* and, secondly, whether, supposing the right to be established, the expediency of exercising that right without delay is equally clear. My Lords, I say *the first point to consider is whether you have the right*, for, however it may be my duty this night to point out to your Lordships the great advantages which may result from the establishment of South American independence, *I hope I shall never stand up in my place in this House to recommend to your Lordships to adopt any course of policy inconsistent with those principles of right which are paramount to all expediency, and compose that great and universal law of nations, any departure from which, to answer the objects of a selfish and ambitious policy, never fails to recoil upon its authors.* The importance of this point, therefore, will be my excuse with your Lordships for detaining you for a few moments, on the preliminary question of right. My Lords, I know of no principle or mode by which we can ascertain whether we possess that right but by considering in the first instance whether those States which form the object of our present consideration are de facto independent, and secondly, if they are de facto independent, whether there be any prospect of the old Government of Spain ever being enabled to recover its command of them so as to possess the advantages she formerly did from them; and thirdly, if they are de facto independent, and there is no prospect of their being again reduced under the dominion of the mother country, whether they have proved themselves disposed and able to maintain those relations of amity and commerce which ought to exist between independent and friendly nations. My Lords, from what I perceive to be the opinion of the noble Earl opposite, and from what I find contained in the papers on the table, it is not necessary for me to dwell much on these topics. On the first —namely, whether these States are de facto independent—I presume that hardly a question can be raised in the mind of anyone who has made himself acquainted with the events which have occurred within the last two or three years in that part of the globe and the absence of all effectual control on the part of Spain, whether exercised by civil or enforced by military authority.

As to the second point, he continues:—

In the first place, my Lords, let us look at the state of Mexico. Mexico, containing 7,000,000 of people, and extending from sea to sea, for the last two years has not had, nor at this moment is there to be found in it, a single Spanish soldier, unless, indeed, in a detached fortress on the coast, where there is a small garrison of about 300 or 400 men. I mean the castle of St. Juan d'Ulloa. But they are cut off from all assistance, and are wholly unconnected with the shore. They may, from the particular situation of the fortress, hold out some time; but, as all communication with the continent has been put a stop to, they can have no influence on the state of the country. In Guatemala there is also now no Spanish force. Throughout the great State of Columbia, extending from the Orinoco to the Isthmus of Darien, there is not now a single Spanish soldier, after a series of contests which

lasted fourteen years, and after the contest assuming every year a character more decisively favourable to the cause of independence, until at length it was completely established by the reduction of Puerto Cabello during the last summer. In the State of Buenos Ayres there has not been anything like a Spanish force for the last twelve or thirteen years, during which period this State has exercised the rights of independence, under various Governments, undisturbed by any effort on the part of the mother country. Indeed, no attempt has been made during the whole of that period by the old Government of Spain to affect existing Governments or interfere with their authority; and it may be worthy of remark by your Lordships, as indicating the determination of public feeling in that country, that although, as I have stated, there have been internal changes—no less than three changes, I believe, of the Administration, or of the government, as you may think proper to call it—so rooted is the aversion entertained by the people to the old Government that in no one of those changes has any person attempted or manifested any disposition to call in the power of the parent country. The same observation will apply to Chili. In that State the most perfect independence has been maintained. For more than four years not a single Spanish soldier has existed in Chili with the exception of an island near the coast—that of Chiloe—to which the partisans of the old government were permitted to emigrate, and where they remain incapable of any offensive operation. With regard to Peru, the circumstances are different; for it must be admitted that, owing to some mismanagement in the Government after its first liberation, there is to be found there, and there only, a party attached to the Old Government of Spain. There alone, then, is anything which can be called an army to be found, consisting, as I am informed, of 7,000 or 8,000 men—a force which, being, as I understand, under the direction of a very efficient leader, has lately met with some success, facilitated by the hitherto disunited councils of its military chiefs, but quite incapable of ultimately subduing the spirit of independence which has taken root in the hearts of the Peruvians, now encouraged by the presence of General Bolivar, who is engaged in extinguishing their feuds, and bringing to their aid all the glory of his name, and that force of his military enterprises, and, if possible, still more his political administration, by which he has established the independence of Columbia, and given to it that constitution which appears destined to become the bond of union and the charter of the liberties of the Confederated States. (*Hansard*, vol. x., N. S., p. 970.)

I pray your readers' careful attention to this extract. It shows first that Lord Lansdowne was clearly of opinion that the question of recognition involved a matter of *right*, and not merely of *policy*, as between the original sovereign State and the recognising Powers. Secondly, it is important carefully to observe the facts with reference to the state of the contest in the several provinces, and the action which the English Government thought itself justified in taking thereupon. The

speech of Lord Lansdowne explains exactly the situation of affairs, and I have before pointed out that Buenos Ayres alone, at this time, was considered entitled to recognition. The recognition of Columbia was postponed because, though herself practically emancipated, she had detached her forces in aid of the Peruvian insurgents, and thereby somewhat imperilled her security. The recognition of Chili and Mexico was deferred on account of the defective organisation of their Governments (vide Stapleton's *Life of Canning*). But what is most important to remark is, that under the circumstances stated by Lord Lansdowne, the recognition of Peru was not even entertained, because the contest still subsisted, though, for the reasons set out in the foregoing speech, the ultimate reinstatement of the power of Spain was as clearly hopeless in that as in the other provinces. This, then, is as authoritative a decision as can possibly be conceived on the part of the English Government, that the real test of the right to recognition depends on the establishment of de facto independence, and that the only legitimate proof of such independence is the cessation of all bonâ fide struggle on the part of the former Sovereign.

Thus far the great Whig authority. I will now cite from the same debate the opinion of a Minister to which the Tory journals, which are so clamorous for recognition, will probably pay some regard. The following passage is from the speech of Lord Liverpool, then Prime Minister, who must be accordingly taken as the authoritative exponent on this subject of the English doctrine:—

> With regard to the question of the recognition of independence, they both agreed that it was to be considered on two grounds, the first, of right; the second, of expediency. *That where no right existed there could be no expediency was an inference in which they both agreed.* He had no difficulty in declaring what had been his conviction during the year (years?) that the struggle had been going on between Spain and the South American provinces —*that there could be no right while the contest was actually going on.* He knew that our own history proved that other powers of Europe had acted towards us under a very different impression. He was aware of the conduct which the House of Bourbon had adopted in the struggle between Great Britain and the North American colonies. It was notorious that, while our armies were in the field (no matter what was the justice or policy of that contest), those powers cut the cord of connection, and, not satisfied with merely acknow-

ledging, assisted the ancient colonies in effecting their separation from the parent State. God forbid that, under any circumstances, Great Britain should feel disposed to follow such an example! *The question ought to be—was the contest going on? He, for one, could not reconcile it to his mind to take any such step so long as the struggle in arms continued undecided.* And while he made that declaration *he meant that it should be a bonâ fide contest.*

You will observe that Lord Liverpool takes the same view of the value of the argument by estoppel which I have recently expressed. I hope his sentiments on this point may not be lost on those who profess to be disciples of the party of which he was so long the respected chief.

Sir J. Mackintosh distinctly admits, in his great speech on this subject (*Miscellaneous Works*, vol. iii. p. 462), that one of the most essential points to determine was 'whether there was a contest with Spain still pending;' by which, he very justly said, 'we must mean such a contest as exhibits some equality of force.' So far from disputing the propriety of the test he accepts it, and proceeds to show that the case of those in whose favour he is arguing satisfies it. He says, 'If I look on Spanish America as one vast unit, the question of the existence of *any serious contest* is too simple to admit the slightest doubt.' He proceeds to ask, 'What is the Spanish strength? A single castle in Mexico, an island on the coast of Chili, and a small army in Upper Peru. Is this a contest approaching to equality?' And again, 'If, on the other hand, we consider the American States as separate, the fact of independence is undisputed, *with respect, at least, to some of them.* What doubts can be entertained of the independence of the immense provinces of Caraccas, New Grenada and Quito, which now form the Republic of Columbia? There a considerable Spanish army has been defeated; all have been either destroyed or expelled from the territory of the Republic; not a Royalist soldier remains. The Republic of Buenos Ayres has an equally undisputed enjoyment of independence. There no Spanish soldier has set his foot for 14 years.' And he concludes this branch of the argument in the following words:—'If, then, we consider these States as one nation, there cannot be said to be any remaining contest. If, on the other hand, we consider them separately, why do we

not immediately comply with the prayer of the petition by recognising the independence of *those which we must allow to be in fact independent?* Where is the objection to the instantaneous recognition at least of Columbia and Buenos Ayres?' It is clear, then, that Sir J. Mackintosh accepted as the test of an independence entitling to recognition the cessation of all 'serious contest.' Such is the doctrine on the subject laid down with great precision by English statesmen, and illustrated in practice by a great historical precedent. I cannot understand how the Edinburgh Reviewer, who contends for the somewhat vague definition of 'a *certain amount* of spirit and power in maintaining its own rights, and a de facto full possession of those rights,' accounts upon his hypothesis for the decision of Mr. Canning not to recognise Peru in 1824. Certainly, Peru, aided by the forces of Bolivar, was not destitute of a certain amount of spirit and power; indeed, Lord Lansdowne expressly states that 'the forces of Spain were quite incapable of ultimately subduing their spirit of independence.'

But the Edinburgh Reviewer seeks to fortify his position by the authority of Mr. Wheaton, a writer of whom I desire to speak with the highest and most sincere respect. Upon this subject, however, I am bound to say that the American publicist has not expressed himself with his usual clearness, precision, and consistency. In a letter of the date of November 8, I cited a passage from Mr. Wheaton's work, which certainly seemed entirely to bear out the view for which I am contending. It will be found in the *Elements of International Law*, vol. i. p. 92:—

> Until the revolution is consummated, *while the civil war involving a contest for the Government continues*, other States may remain indifferent spectators of the controversy, *still continuing to treat the ancient Government as sovereign and the Government de facto as a society entitled to the rights of war against its enemy;* or may espouse the cause of the party which they believe to have justice on its side. In the first case, the foreign State fulfils all its obligations under the law of nations; and neither party has any right to complain, provided it maintains an impartial neutrality. In the latter it becomes, of course, the enemy of the party against whom it declares itself, and the ally of the other; and as the positive law of nations makes no distinction in this respect between a just and an unjust war, the intervening State becomes entitled to all the rights of war against the opposite party.

It is certainly just to infer from this passage that Mr. Wheaton's opinion is, that while 'the civil war involving a contest for the Government continues,' other States have only two alternatives; one is, that of remaining neutral, in which situation it is necessary that 'it should continue to treat the ancient Government as sovereign and the Government de facto as entitled to the rights of war;' the other is to espouse the side of one, and so to become its ally, and the enemy of the other belligerent. If 'to continue to treat the ancient Government as sovereign de facto while the civil war continues' is to 'fulfil *the obligations of the foreign State under the Law of Nations*,' the question of recognition is clearly in the view of Mr. Wheaton one of law, and not of policy only. But, in order to deal fairly with the Reviewer, I must assume that, in quoting Mr. Wheaton, he relies on the following passage at page 97 :—

> It has been already stated that while the contest for sovereignty continues, and the civil war rages, other nations may either remain passive, allowing to both contending parties all the rights which war gives to public enemies, or may acknowledge the independence of the new State, forming with it treaties of amity and commerce; or may join in alliance with one party or the other. In the first case, *neither party has any right to complain, so long as other nations maintain an impartial neutrality, and abide the event of the contest*; the last two cases involve questions which seem to belong rather to the field of politics than of law; but the practice of nations, if it does not furnish an invariable rule for the solution of these questions, will at least shed some light upon them.

It is, perhaps, not very easy to reconcile these two passages with one another; and there is a looseness of statement in the second which is somewhat unsatisfactory. It appears, however, that in Mr. Wheaton's opinion the part of an 'impartial neutrality' is to 'abide the event of the contest;' and this is the only conduct which Mr. Wheaton certainly says 'neither party has a right to complain of.' He places the 'acknowledgement of independence,' and the 'joining in alliance' with one of the belligerents, in another category, and treats them both as a question of politics rather than of law. But, as 'joining in alliance' would certainly be a ground of war, perhaps he means that the 'acknowledgement of independence,' without 'abiding the event of the contest,' would be in itself

an act of hostile intervention, and, consequently, belong rather to the province of politics than of law. And possibly the somewhat lax practice of his own country on these subjects may have betrayed this eminent writer into statements less precise than might be desirable in a scientific treatise.

On the subject of the 'practice of nations,' to which tribunal Mr. Wheaton refers the question, his brief summary is not satisfactory. It will be found that his account of the recognition of the South American Republics, so far as he states it to be solely a question of expediency, and not of right, does not coincide with the views of the English statesman I have cited. His treatment, also, of the important precedent of the English declaration of war in 1778, is by no means accurate. On this subject also Mr. Wheaton's national bias seems to have somewhat warped the habitual soundness of his judgement. And it is not unnatural that an American publicist should take a somewhat lenient view of a transaction, without which the United States would never have become a nation.

It is alleged that the English declaration of war against France in 1778 was not founded, nor could it be justified, upon the ground of the simple recognition of the American insurgents by the negotiation of a treaty of commerce. The relation of this transaction to the present argument is so important, that it is worth while to ascertain with accuracy the true state of the facts. It is not right that any misconception should exist upon a chapter of our own history, at once so famous and so unfortunate. The Edinburgh Reviewer on this point does not agree with Mr. Wheaton; and I have the misfortune to differ from both. The Edinburgh Reviewer is, I think, right in condemning the opinion of Mr. Wheaton, that the treaty of alliance concluded between France and the revolted colonies would not have been a good ground for a declaration of war on the part of Great Britain. But he is wrong in affirming that the treaty of alliance of 1778 was the ground of the English declaration of hostilities. Both the Reviewer and Mr. Wheaton have been misled by assuming Gibbon's celebrated *pièce justicatif* to be the contemporary statement of

* Vide Note in *Annual Register*.

the causes of this war. A closer attention to dates and facts will show that this is not the case. Gibbon's memoir, which will be found in the *Annual Register* for 1780, is without date; but it is not difficult to discover the proximate time of its composition. It was written by order of the English Government, though apparently not published by authority*, as an answer to the French document setting forth the complaints of the Court of Versailles, which appeared in 1779. Gibbon became a Lord of Trade in the summer of that year; and it is probable that his memoir first saw the light towards the end of 1779. An amusing account of this job which the great historian undertook, will be found in his autobiography. This paper, written, as we have seen, nearly two years after the declaration of war, would naturally contain a number of grievances which were not known or thought of when the war originally broke out; and, among others, the offensive alliance concluded between France and the insurgent provinces in anticipation of the war. The real causes of the war are to be sought and must be confined to the transactions out of which it immediately arose. They will be found to be these: — On March 13, 1778, the Marquis de Noailles, the French ambassador in London, communicated to the English Government the conclusion of a *treaty of commerce* between the Court of Versailles and the rebellious States of America. The note, which, though most perfidious in its spirit, affects a friendly tone, will be found in the *Annual Register* for 1778, and is couched in the following terms:—

The undersigned, Ambassador of His Most Christian Majesty, has received express orders to make the following declaration to the Court of London:—

'The United States of North America, who are in full possession of independence, as pronounced by them on the 4th of July, 1776, having proposed to the King to consolidate by a formal convention the connections begun to be established between the two nations, the respective Plenipotentiaries have signed a treaty of friendship and commerce, designed to serve as a foundation for their mutual good correspondence.

'His Majesty, being determined to cultivate the good understanding subsisting between France and Great Britain by every means compatible with his dignity and the good of his subjects, thinks it necessary to make his proceeding known to the Court of London, and to declare at the same time that the contracting parties have paid great attention not to stipulate any exclusive advantages in favour of the French nation, and that the United

States have reserved the liberty of treating with every nation whatever upon the same footing of equality and reciprocity.

'In making this communication to the Court of London, the King is firmly persuaded it will find new proofs of His Majesty's constant and sincere disposition for peace, and that His Britannic Majesty, animated by the same sentiments, will equally avoid everything that may alter their good harmony, and that he will particularly take effectual measures to prevent the commerce between His Majesty's subjects and the United States of North America from being interrupted, and to cause all the usages received between commercial nations to be in this respect observed, and all those rules which can be said to subsist between the two Crowns of France and Great Britain.

'In this just confidence, the undersigned Ambassador thinks it superfluous to acquaint the British Minister that, the King his master being determined to protect effectually the lawful commerce of his subjects, and to maintain the dignity of his flag, His Majesty has in consequence taken effectual measures in concert with the United States of North America.'

On the 17th of the same month the King's Message was brought down to Parliament, announcing that the English Ambassador was ordered to leave France. I quote the very words of this document, in order to show that the sole and exclusive ground of the English declaration of war was the recognition of independence of the insurgents, and the negotiation with them of the commercial treaty, and made no sort of allusion to any other ground of quarrel whatsoever:—

His Majesty having been informed, by order of the French King, that a *treaty of amity and commerce* has been signed between the Court of France and certain persons employed by His Majesty's revolted subjects in North America, has judged it necessary to direct that a copy of the declaration, delivered by the French Ambassador to Lord Viscount Weymouth, be laid before the House of Commons; and at the same time to acquaint them that His Majesty has thought proper, in consequence of this offensive communication on the part of the court of France, to send orders to his ambassador to withdraw from that court. His Majesty is persuaded that the justice and good faith of his conduct towards foreign powers, and the sincerity of his wishes to preserve the tranquillity of Europe, will be acknowledged by all the world; and His Majesty trusts that he shall not stand responsible for the disturbance of that tranquillity if he should find himself called upon to resent so unprovoked and so unjust an aggression on the honour of his crown and the essential interests of his kingdoms, contrary to the most solemn assurances, *subversive of the law of nations*, and injurious to the rights of every foreign power in Europe.

Here, then, is the precise and definite declaration of the English Government, that the sole and sufficient ground of the

war they are about to declare is the negotiation of a treaty of commerce, and the recognition thereby implied of the insurgent provinces—a course which is here pronounced to be 'subversive of the law of nations.'

That this was not merely the official pretext, but the real ground of the war, clearly appears from a private letter of Gibbon. The following passage will be found in a letter to Holroyd, in the *Miscellaneous Works*, of the date of February 23, 1778:—'It is positively asserted, both in private and in Parliament, and not contradicted by the Ministers, that on the 5th of this month a *treaty of commerce* (*which naturally leads to war*) was signed at Paris with the Independent States of America.' It is idle, in the face of these documents, to maintain that the English Government did not think the negotiation of a treaty of commerce with the rebels, and the recognition of their independence thereby implied, a sufficient ground of war by itself, or that they in reality meant to rest their declaration of hostilities on any other ground. It has been said that the French Declaration was offensive in its tone. I confess it seems to me that its offensiveness consisted rather in the facts that it announced than in the incivility of its form. If the act of recognition was permissible and lawful, it can hardly be pretended that such a declaration could have afforded a justifiable pretext for war.

It is suggested, indeed, that the Government of the day must have known of other and better grounds for the serious measure of declaring war against France, which might be abundantly found in the secret and perfidious machinations by which her conduct on that occasion was disgracefully distinguished.* This, I confess, seems to me an inadmissible speculation in the face of these conclusive documents. It may be assumed that when one Government declares war against another, it gives the best reasons within its knowledge and at its disposal to justify its conduct. I can understand that a nation may be in reality actuated by a bad motive while it alleges a good pretence. But it is not consistent with common sense to suppose that the

* Vide the remarks of Sir J. Mackintosh on this point ('Miscel. Works,' vol. iii. p. 449), which do not, however, appear to me, for the reasons given above, to be satisfactory.

English Government in 1778, having plenty of better grounds for their declaration of war in the background, preferred to rest it on an insufficient reason. They rested it, as we have seen, exclusively on the communication of the commercial treaty—a ground which they evidently thought their best and sufficient justification, in which opinion I submit they were perfectly well founded.

The Edinburgh Reviewer has fallen into an important error on this point. He says that the treaty of 1778 justified a declaration of war by Great Britain, because it 'provided that in the event of war the two States should make common cause against Great Britain.' But the treaty of 1778, which was the ground of the war, contained no such clause. The reviewer has overlooked the important circumstance that there were *two* treaties of 1778, which will be found together in Martens' *Receuil*, vol. ii.; one, a *treaty of commerce*, which was that communicated to the English Government by the Marquis de Noailles; the other, a *treaty of alliance*, which was made because the parties to it knew that the treaty of commerce would inevitably lead to war, but was kept back till it was divulged *after* the declaration of war. The clause to which the reviewer alludes is in the secret treaty of alliance, which was not communicated, and which, consequently, was not the ground of the declaration of war. It is *not* in the treaty of commerce, which, as we have seen, was the exclusive matter relied on by the King in his message to Parliament, which for the purpose of an international argument must be taken to be the true cause of the war.

It may be surmised that the English Government knew or suspected the existence of the treaty of alliance; and, indeed, this appears from Lord Stormont's letters, vide Lord Mahon's *Hist.*, vol. vi., App., p. xxiii. Yet, though they may have had good grounds for suspecting it, they had no such cognisance of it as would enable them to found upon it a cause of hostilities; they, therefore, wisely confined themselves to the fact of recognition and the communication of the commercial treaty, which they held to be all-sufficient for their justification.

What, then, are the conclusions to be deduced from these authentic and binding historical precedents? First, that in 1778 the English Government treated what the Edinburgh

Reviewer calls the 'moral recognition' of an insurgent province, during the pendency of the contest, by the negotiation of a commercial treaty, as a breach of neutrality, 'subversive of the law of nations,' and affording a justifiable ground of war. They held and acted upon the doctrine that while the struggle still continues, the recognition of the insurgents by a foreign State is an international wrong to the original sovereign. Upon precisely the same grounds, the leading statesmen of both parties in 1824 declared that, in order to the recognition of the South American Republics, it was necessary to establish, not as a question of policy only, but of right, that the contest was substantially at an end. They did not think themselves at liberty to speculate on the question whether the efforts still maintained by the ancient Government would or would not in the end prove successful. They acted, and thought themselves at liberty to act, only in those cases when the independence of the insurgents was actually established, by the real cessation of the contest. As I have shown in my last letter, the case of Texas, so far from being an exception to this rule, is only a fresh illustration of the principle, the more valuable because the most recent. For these reasons I must express my entire dissent from the opinion of the Edinburgh Reviewer, that the question of recognition is one solely of policy, and not of law; and I must equally protest against the proposition put forth at page 298 of that publication, that the 'establishment of diplomatic relations with the rebellious States, accompanied by treaties of commerce and amity,' while the contest for Government still subsists in full force, 'affords no legitimate ground for complaint' to the ancient sovereign. The Edinburgh Reviewer, from his own point of view, is distinctly against the policy of recognition; but with this question I do not propose at present to deal.

NOTE.

It is a high satisfaction to the writer of the foregoing letters to find, in the speech of the Earl of Derby at the opening of the present session of Parliament, a far abler and more authoritative exposition of the doctrine here laid down, in the following passage on the state of American affairs. It will be seen that the view of the noble earl is in complete conformity with that which is contained in these letters:—

It has been said by personal and political friends of my own, by men for whose opinions I entertain the highest respect, that the time has arrived when it is desirable that we should recognise the Southern Republic. Upon that subject, regretting as I do to differ from any of my friends, I confess I cannot bring myself to the conclusion that the time has arrived at which it is either wise, politic, or even legitimate, to recognise the South. I do not think the circumstances have yet occurred under which a revolting State is entitled to recognition from neutral Powers. The first of those circumstances is where, although the State from which a secession has taken place has not acquiesced in it as a *fait accompli*, yet the war is, in point of fact, at an end, and no struggle is going on for the restoration of the original dominion. That was the case when the States of South America revolted from Spain. For a long period before those States were recognised by the Powers, Spain had ceased to take any active steps to keep them under her rule. Another set of circumstances under which recognition is legitimate, is where other nations, having in the interests of humanity determined that a desolating warfare shall no longer be continued, agree to recognise the revolting party. But in that case recognition is always followed by something further, for it means nothing unless the powers who join it are ready to support by force of arms the claims of the State which they recognise. That was the case when Belgium separated from Holland, and when Greece separated from Turkey. No doubt there are occasions when the horrors of war, and the danger to the public interests of the world, from the prolongation of a contest, are so great, that it is essential it should be terminated by other nations intervening to recognise the secessionist; but, in that event, they must be prepared to go a step further, and to maintain by force the independence which they have acknowledged. I cannot but think that this consideration has not been sufficiently weighed by those who are anxious for the recognition of the South. My conviction, which has been strengthened by everything which has occurred from the first outbreak of the civil war, is that the restoration of the Union as it formerly existed is the one conclusion which is absolutely impossible. I believe that at first the feelings of this country were strongly in favour of the North, and that it was not generally supposed that the North would have any great difficulty in overrunning and subduing the South. But even at that early period it was perceived that, if the North

were to succeed in subjugating the South, its difficulties would only commence, because it was out of the question that where such mutual animosity existed, and such injuries had been inflicted on one side and on the other, any cordial reconciliation could take place between them. If it was so a year or two years ago, how much stronger must this conviction have grown when day by day the struggle becomes more desperate, when it is more apparent that neither party can obtain a signal and decisive advantage over the other, the one on the defensive being always the one which has practically the best of it; and when it is obvious that the continuance of the war is the continuance of the most dreadful slaughter and the most harrowing carnage, accompanied by increasing bitterness of feeling and, if we may believe reports, by aggravating atrocities on both sides, which add unusual horrors to those by which war, and especially a civil war, is attended? Under these circumstances, I declare my firm conviction that there is no possibility of re-establishing the Union between the North and the South. At the same time recollect the struggle is still going on. The whole seaboard of the South is in the possession of the North, and large Federal armies are in Southern territory, where they obtain occasional advantages. That being the case, we have no right to recognise the South, unless we mean to do what I do not believe the advocates of recognition are prepared for—interfere by force of arms, and insist on laying down the terms on which a separation is to take place. Therefore, I own I approve, on the whole, of the course pursued by the Government, and of that entire neutrality which I believe they have practically carried out to the utmost extent in their power. No man with ordinary sentiments of humanity can fail earnestly to desire that the desolating warfare in America should be brought to a close, and I am quite certain that the present Government, or any other which might be in power in this country, would eagerly embrace the first opportunity that had a fair prospect of success, of tendering such good offices as might lead to a cessation of hostilities. At the present moment I do not see any prospect of such a result, and fear that the war must go on until both of the combatants simultaneously see the necessity of coming to some settlement.

A LETTER

ON THE PERILS OF INTERVENTION

NEUTRALITY OR INTERVENTION?

Sir,—The doctrine which I have ventured to lay down on the subject of Recognition being substantially unimpeached, I shall not trouble you at any further length on a point which may be taken to be too clear to admit of dispute.

I therefore dismiss the topic of Recognition, and propose to offer a few remarks on the far more debateable head of Intervention. Here we must leave the firm and beaten path which law has defined and practice consolidated, to explore the fluctuating and trackless depths of policy. In such a case the conscience of those who wield the might becomes the only rule of right. I do not intend to disparage Intervention. It is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law. Nevertheless, it must be admitted that in the case of Intervention, as in that of Revolution, its essence is illegality, and its justification is its success. Of all things, at once the most unjustifiable and the most impolitic is an unsuccessful Intervention.

Now, Intervention may be of various kinds and of different degrees. As a famous physician said of scarlet fever, it may be anything, from a fleabite to the plague. And it is by no means impossible that it may begin with one and end with the other. There are many persons with whom the milder or fleabite form seems to be highly popular. Remonstrance, advice, moral force, and mediation, are phrases which pass glibly current, and are assumed to be at once innocuous and efficacious. Yet it is not to be wondered at if those on whom devolves the responsibility of action should pause to consider whether, in fact, they are likely in the result to prove to be either. The Emperor of the French has within the last few days propounded a scheme of Intervention to the English Government, of which

the best that can be said is that it is an intervention which does not propose to intervene. This project contemplates nothing more than that the American belligerents should be requested to conclude an armistice for six months and to suspend the blockade. The proposition is accompanied by no ulterior provisions in case this singular offer should be declined. Canute on this occasion seems to be no wiser than his courtiers. In what chapter of ancient or of modern history has the Emperor learnt that the waters of strife, surging with the tides of passion, are wont to subside at the invitation of Monarchs, however powerful? Or is it the success which has attended the counsels he has tendered at Rome which inspires him with such confidence in the prevalence of moral force and European remonstrance at Washington? I have read, indeed, in *Virgil* of the wrath of belligerent bees being composed *pulveris exigui jactu;* but in the more prosaic pages of the *Annual Register* it may be remarked that the powder employed in the pacification of nations has generally smacked most consumedly of saltpetre. The only precedent in which, as far as I am aware, an intervention of this complimentary kind has been successfully attempted is that recorded in the *Critic*, where the gentlemen who are at a deadlock are charged in the Queen's name to drop their swords and daggers—*which they accordingly do.* But, as the ingenious author in the same piece remarks, 'when they do agree on the stage, their unanimity is wonderful.' Unhappily, on the theatre of the world the players are by no means so mindful of their cues or so obedient to the prompter.

No, sir, this is mere child's play. Intervention 'should be made of sterner stuff than this.' The only object and justification of intervention is peace. To interpose without the means or the intention to carry into effect a permanent pacification is not to intervene, but to intermeddle. I do not say that intervention may not be justifiable or even politic, but that it may be either it must be efficacious. An inconclusive interference is at once impertinent and mischievous.

There are many persons who talk of intervention as if it were a light and easy affair. They picture to themselves a smart despatch garnished with plenty of fine sentiments, backed by a few good signatures, and they suppose the trick is done.

But in this matter it were well to take counsel of experience—the Instructress of nations. The records of history will teach us that interventions have not been accomplished with Foreign-office rose-water alone. I pointed out in my former letter that the instances of Belgium and Greece, which had been alleged as precedents for recognition, were in fact cases of intervention. Thereupon the undaunted advocates of the South—equal to either fortune—reply, 'Well, if we cannot recognise, let us intervene, after the fashion of Belgium and of Greece.' Now, I vehemently suspect that those persons who are so urgent for action in this matter are as little acquainted with the history of the policy as they are with the principles of law involved in the transactions on which they are so ready to rely. I know there are persons who think that if France, England, and Russia could only make up their minds to do what is very safely, though somewhat indefinitely, called 'something,' the whole affair would be settled 'out of hand,' peace would be declared at once, the ports would be opened, Lancashire would get its cotton, and America would settle down at once into a condition of happy and contented insignificance. Statesmen, however, who, like the Prime Minister of England, have themselves had the conduct of real intervention, may be excused for not indulging themselves in this sort of Paradise of fools.

Let me recall to your recollection the outlines of the history of that Belgian Intervention which we are invited to reproduce. In the first place, the intervention originated at the express instance of the former Sovereign of the insurgent provinces. This is a circumstance very well worthy of remark. Wheaton, in his *History of International Law*, uses these significant expressions:—

> Jurisdiction over the controversy between the two States was assumed in the first instance by the Conference in consequence of the application of the King of the Netherlands to the British Government, requesting that the five great European Powers might appoint Plenipotentiaries to assemble in Congress for the purpose of effecting a conciliatory mediation between the two great divisions of the kingdom.

I am not aware that a similar communication from the Cabinet of Washington has yet reached the Foreign-office. When it does so, the cases will be more nearly parallel. In the case of

Belgium, the Conference commenced its operations by the Protocol of December, 1830. The necessity of a definite basis of negotiation was at once apparent. The ancient limits of Holland in 1790 supplied an obvious and intelligible boundary. In this case, the great Powers did not invite — they insisted upon an armistice; and the belligerents yielded to that which they knew would be enforced. The Protocol of January, 1831, fixed the limits of the contending States. The five Powers, in the commencement of the negotiation, were completely at one; but what was the result? Did peace immediately ensue, or did the combatants submit to the award? Quite the contrary. The King of Holland refused to agree, because he thought he lost too much. The Belgian Assembly was equally recalcitrant, because it considered it had got too little. Thereupon the great Powers began to quarrel among themselves. England and France supported the Belgian pretensions, and threw overboard the original agreement as to the duchy of Luxemburg. Prussia and Russia sustained the King of Holland in insisting upon the first understanding. In this state of things, the Prince of Orange, in the face of the whole five Powers sitting in conference, within a few days' march of the French army, and a few hours' sail of the British fleet, denounced the armistice, marched into Belgium, and gave the newly-created King, whom the intervening Powers had just set upon his throne, a very sound thrashing. The English and French, of course, were obliged to come to the rescue, the one by land, the other by sea, and the Dutch army was forced to withdraw. It will be remarked, therefore, that a great European intervention, whatever else it may effect, does not, — even in dealing with such a war of pigmies and of cranes as that between Holland and Belgium, and which, compared to the colossal contest in America, was but a petty brawl, — necessarily or immediately produce peace. The result of the first nine months of intervention proved to be that both the original combatants were again at war, and that two of the intervening Powers were in arms in support of one of the belligerents. But this was by no means the end of the affair. In October and November, 1831, the intervening Powers again tried their hands at a settlement, which proclaimed itself to be 'final and

irrevocable.' It is hardly necessary to remark that this 'final' settlement brought nothing to an end, and the 'irrevocable' determination was ultimately revoked. The Belgians refused to acquiesce in the decision as to the Luxemburg territory, and the Dutch were equally obstinate in their persistence not to relinquish their rights. So matters went on till October, 1832, when two of the intervening Powers—England and France—entered into a second convention to compel by force the evacuation of the citadel of Antwerp. Accordingly, a French army marched into Belgium, and an English fleet entered the Scheldt. Russia and the German Powers vehemently dissented from the policy of England and France, and held the most menacing language towards their partners in the mediation. It is notorious that the Western Powers were at this moment on the very brink of war with the German Confederation. Thus, then, the second complete year of mediation disclosed the unsatisfactory spectacle of intense hostility between the intervening Powers and actual war carried on by two of the mediators against one of the subjects of mediation. It was not till May, 1833, or two years and a half from its commencement, that the Belgian intervention arrived at a satisfactory and peaceful conclusion.

Does, then, the example of Greece encourage the hopes of a speedier or more satisfactory end? The Greek insurrection began in 1821. The insurgents requested in vain the interposition of the Congress of Verona. The intervention may be said practically to have commenced with the Protocol of 1826, between England and Russia. By the treaty of 1827, France acceded to the arrangement. Here, again, the armistice was not suggested but imposed. It should be observed, that in both these documents it was thought necessary to define a distinct basis of action. The *suzeraineté* of the Porte was to be reserved while the practical independence of the Greeks was to be secured. Did the Sultan, however, after six years of savage and doubtful contest with his rebellious subjects, peacefully accept the fiat of the three great Powers? Did he submit to the moral force of their representations, or succumb to the overwhelming superiority of their resources? Not a bit of it. The overtures of the great Powers were rejected with indignation and disdain.

Within a few weeks from the signature of the treaty, the 'moral' force of Europe brought about the 'untoward event' of Navarino. Did even this terrible catastrophe precipitate a solution? So far from it that, after the lapse of a year, it became necessary, in 1828, to send a French army of occupation, under Marshal Maison, to expel the Turks from Greece. All this time one of the great mediating Powers was carrying on separate hostilities on its own account with Turkey. And so profound was the distrust, and so adverse the interests of England and Russia with reference to the principal subject of the mediation, that during the Russian advance on Constantinople, the Cabinets of London and Vienna entered into a secret treaty for the defence of Turkey, and just before the treaty of Adrianople, the English admiral was actually under orders to attack the Russian fleet in the Levant.* Such was the state of things, as between the mediating Powers themselves and those on whom their good offices were pressed, at the end of the third year of intervention. From 1828 to 1833, the patriots whose independence and happiness the interposition of Europe had secured, were principally employed in cutting each other's throats. For five years a military occupation by one of the mediators proved indispensable, and, by way of interlude, the Greeks took to murdering their French protectors at Argos. '*Dulces reminiscitur Argos.*' In 1833, seven years after its commencement, the Greek intervention may be said to have been closed by the arrival of Otho *le desiré*. '*Tantæ molis erat.*' Through such dangers and by so much toil was built up that rotten edifice which has just tottered to its fall.

I might indefinitely prolong the record of intervention. I might remind you of that more recent negotiation at Vienna, which commenced with remonstrances at St. Petersburg, but whose ultimate story is recorded in the frequent hillocks which stud the heights of Sebastopol. Did Russia yield her lust of vengeance, or her passion for dominion, to the solicitation of collective Europe? Or do we dream that Presidents are more amenable to the voice of reason than Emperors?

Intervention may be wise, may be right,—nay, sometimes may even be necessary. But let us not deceive ourselves;

* Vide 'Alison's History.'

intervention never has been, never will be, never can be short, simple, or peaceable. Conducted under the most favourable circumstances, we have seen that it almost inevitably before its solution results in war. Let those who are simple enough to place reliance on the cogency of moral pressure remember that the petty strength of Holland defied the five great Powers of Europe—that the decrepit Government of Turkey resisted the collective dictation of Russia, England, and France. If the history of the past will not satisfy them of this, let them look at the experience of our own day. Let them mark the Pope as he lies in the hollow of Napoleon's hand, bearding him to his face. I do not say that England, Russia, and France might not impose their will upon the American belligerents; I do not argue the question whether it is right that they should do so. But this I venture to affirm, that they never will and never can accomplish it except by recourse to arms; it may be by making war upon the North, it may be by making war upon the South, or, what is still more probable, it may be by making war upon both in turns. A Northern Navarino may be redressed by a Southern Antwerp. But it will not be a question of a Dutch garrison or an Ottoman fleet. We shall have to deal with two military nations, disciplined by recent practice of war, and whose forces are counted by hundreds of thousands of men.

This, however, is by no means the full extent of the mischief. The case I have supposed assumes the existence of a basis of action, in which the mediating Powers constantly concur. Can such a basis be constructed, or, if it could, what prospect is there of its being sustained? In the case of Belgium and Greece, the first step was to define the principles of action, and the leading features of reconstruction. Is such a course possible here? I have asked the question before, but I have found no answer to it—What is to be the basis of intervention? In the case of Belgium the basis was the boundary of 1790; in that of Greece the *suzeraineté* of the Porte. But what is to be the basis of the mediation between the North and the South? Where is a boundary-line to be drawn which one side may be reasonably asked to concede, and the other to accept? I believe the definition of such a line of demarcation in the present state of the contest to be wholly impossible. But, assume the

boundary to be settled and accepted, would peace be re-established, or could it for a moment be maintained while such questions as those of slavery, the right to the Territories, the partition of the debt, and the navigation of the rivers, remained open? If we are to intervene it is in order to establish peace. But we cannot establish peace except by settling all the bellicose questions between the parties; for otherwise they will infallibly recur to arms in order to resolve them. The notion of an armistice which should terminate, leaving undecided the question which is designated in America by the phrase of the 'irrepressible conflict,' is childish in the extreme. It would be simply giving breath to the feeblest party in order to refresh him for another round.

The historical examples to which I have referred read us, moreover, another lesson which it were well not to disregard. The great Powers who have undertaken to make peace between others have seldom failed before they have done to quarrel among themselves. We have seen that, in the Belgian Intervention, England and France were on the eve of a breach with Russia and Germany. In the course of the Greek Intervention, open hostilities between Russia and England were hardly averted. Even assuming that the Powers could agree on a basis of action in the American affair, how long is it probable that they would adhere to it? Has England no interests in Canada, France no views in Mexico which might lead to a divergence on various points in the negotiation? What security is there that, as in the case of Belgium and Greece, dissentient sections of the mediating Powers should not end by ranging themselves in hostile camps side by side with the original belligerents: and that thus, in an ill-judged attempt to quench the American strife, we should in the result endanger the peace of Europe?

These perils which I have pointed out are common to all interventions, even where nothing is involved but ordinary political interests. I have said that intervention, if it is to be justifiable or valuable, must embrace and exhaust all the subjects of controversy between the parties; otherwise it must fail of its chief end, which is peace. Can there be peace in America while the question of slavery, and all that hangs upon

it, remains undecided? This terrible and insoluble question presents difficulties which no intervention has ever yet had to encounter. Yet to intervene and leave this question open is to do nothing, or worse than nothing. It is to sanction what we do not reprobate, and to perpetuate what we do not abolish. From the moment that we undertake the settlement of American affairs, we shall become the moral accomplices of the state of things which our mediation will establish and confirm. Is there any man so sanguine as to hope that the end of this business is to be the extinction of slavery? But, if not, are we to become the virtual guarantors for its security? To my mind, in the one word 'slavery' is comprehended a perpetual bar to the notion of English mediation as between the North and the South; a bar to amicable mediation, because it would be futile; to forcible intervention, because it would be immoral. Shallow and inexperienced observers may suppose that English opinion has undergone a revolution on the subject of slavery. It is true that the English public has been revolted by the insincerity and hypocrisy of Northern politicians on this question.* We have seen through the cant by which political capital has been manufactured out of a great cause; but, on the true merits of the question itself, I believe the convictions of the English people to be wholly unchanged. It is my firm persuasion that there is no sentiment more deeply rooted in the conscience of the nation than the abhorrence of the principles and practice of that which is called in the South 'the peculiar institution,' but which in England we know by the more straightforward name of 'negro slavery.' If we refuse to become the dupes of Northern insincerity, we are equally determined not to make ourselves the abettors of Southern iniquity. A joint mediation, involving the settlement of this question, would practically place our honour in

* The writer of these pages will yield to no man in his detestation of slavery and all that belongs to it. But it is idle to expect that the followers of Wilberforce should hail with acclamations the policy of President Lincoln, who proclaims emancipation as an act of *military* confiscation, and offers the boon of slavery as the appropriate reward of political loyalty. The institution of slavery has been and is the *cause* of the war, but emancipation is not and never has been the *object* of the war.

the hands of our copartners in the intervention. We might find ourselves placed in a position in which it would be equally difficult to advance with credit or retire with safety. Yet any administration, which should compromise the character of England in a cause for which she has encountered so many sacrifices, would make a fatal and inexcusable mistake.

I am not insensible to the respectable sentiments of humanity which are invoked to support the case for intervention; but I also know that, of all things, the most cruel is a mistaken and useless interference. Recognition and intervention are recommended in turn, as the certain methods of giving us what we most desire—viz., peace and cotton. But will they give us either? I confess, on this point, I have been a good deal edified by an article in a paper called the *Index*, which is supposed to be the London organ of Southern politicians. I there find an elaborate demonstration (intended, of course, to reassure the Liverpool speculators), that recognition will, probably, not produce immediate peace, and certainly will not give us cheap cotton. The following sentences sufficiently show the scope of the argument:—

> We do not agree with those who say that Recognition will be forthwith followed by peace, but we are quite sure that Recognition, even if it should suddenly put an end to the hostilities, will not diminish the value of the present or then stocks of cotton. So far from peace bringing down the price of cotton, it is highly probable that after a temporary fluctuation holders may realize higher prices from the unusual demands.

If recognition, then, upon the showing of the Southerners themselves, is not likely to give us peace, and even peace is not to give us cheap cotton, why should we commit ourselves either to recognition or to intervention?

I have endeavoured, I fear at intolerable length, to draw your readers' attention to the general dangers of intervention in all cases, and to the special difficulties of this particular instance. I say nothing of the great and formidable power of both belligerents, whom we might have to coerce in turn. I say nothing of the distance of England, and the proximity of Canada to the seat of the war. I rest upon grounds which are far broader, and, I confess, seem to me unanswerable. I will assume both belligerent powers reduced to submission to-morrow, and Europe at

liberty to mould their destinies at her pleasure. I say that the great Powers could not agree for a day, still less remain in accord for a month, as to the principles of reconstruction. To settle a definite basis of common action is impossible; to plunge into intervention without such a basis would be insane. Mr. Canning insisted upon the peculiar dangers of a 'war of opinion,' but a contest which involves questions of conscience is still more hopelessly insoluble. One might have thought that the experience of the Papal intervention should have deterred continental politicians from further involving themselves in similar problems. As long as we persist in our attitude of neutrality we are safe —all beyond is dangerous and unsound. The perils and the difficulties are certain; the advantages distant and most problematical. Happily, the destinies of this country are at this moment in the hands of men who, for experience in the conduct of affairs, have not their equals in the councils of Europe. They cannot be supposed to be indifferent to the catastrophe of America or the sufferings of Europe. But we are in a situation in which a single mistake may be fraught with consequences wholly irreparable. We are asked to go we know not whither, in order to do we know not what.

Dii meliora piis erroremque hostibus illum!

SOME REMARKS ON A WORK OF M. HAUTEFEUILLE

ENTITLED

'DES DROITS ET DES DEVOIRS DES NATIONS NEUTRES.'

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In the course of the discussions which are attempted in the following letters, I have had frequent occasion to criticise the writings of M. Hautefeuille. In republishing them, I have nothing to retract or to modify in the opinions which I have thought it necessary to express as to the spirit and the merits of that author's performances. Professing to compose a serious work on one of the most important chapters of the Law of Nations, M. Hautefeuille has produced three volumes, which deserve nothing better than the title happily bestowed on Barrère's 'Détroite des Mers, ou le Gouvernement Anglois dévoilé,' of a 'bulky libel on Great Britain.' In justification of the unqualified condemnation which I have pronounced on the pretensions of M. Hautefeuille to consideration as a publicist, I propose to offer a few remarks, first, on the spirit in which he has addressed himself to the subject he undertakes to treat, and secondly on the method upon which his system is founded.

As to the first point, the *Discours Préliminaire*, by which his treatise is introduced, sufficiently explains the aim and scope of his book. He frankly avows that his deliberate object is to lay the foundation of an European confederation against the maritime interests of Great Britain.

The following passages are sufficiently explicit:—

Des faits qui précèdent il résulte que faute d'un équilibre maritime, toutes les nations sont à la merci d'un peuple qui a toujours usé et use encore de sa prépondérance pour les opprimer et pour anéantir leur commerce et leur navigation. Un pareil état de choses est-il donc sans remède? N'existe-il aucun moyen pour le monde opprimé, de mettre un frein à de si graves abus? N'est-il plus possible à aucun peuple de jouir des bien-

faits de la paix lorsque l'Angleterre est en guerre, de rester neutre en conservant sa liberté et son indépendance? Le mal, quelque grand qu'il soit, ne me paraît pas sans remède; je ne pense pas l'univers soit réduit pour toujours à courber la tête sous le joug britannique. Cependant je ne connais qu'un seul moyen efficace de réussir, sinon à créer immédiatement un équilibre maritime, au moins à établir un contrepoids à la puissance dominante, contrepoids qui, appliqué pendant quelque temps avec persévérance, amènera naturellement l'équilibre complet. J'ajouterai que pour employer utilement ce moyen, le moment opportun me paraît arrivé.

Chacun, pris isolement, ne saurait avoir aucune influence, mais tous réunis en un faisceau présenteraient un ensemble capable d'en imposer à la Grande-Bretagne elle-même. Une alliance permanente de neutralité armée est, à mon avis, le seul moyen efficace de suppléer d'abord à l'absence d'équilibre maritime et de l'établir dans un avenir peu éloigné. Si toutes les nations s'entendaient sur ce point, l'Angleterre elle-même se joindrait aux autres: elle a trop de sagacité pour ne pas reconnaître son intérêt, où il se trouve, et trop d'habileté pour ne pas le suivre partout où elle le reconnaît.

Puisse la France, ma patrie, qui la première a montré l'exemple sincère du respect dû aux peuples neutres se mettre à la tête de cette alliance que je ne crains pas d'appeler sainte, puisqu'elle aurait pour but et pour résultat et d'assurer à chaque nation la jouissance de la liberté de l'indépendance et de tous les droits qu'elle tient de Dieu lui-même! Je serais heureux si je pouvais contribuer, même pour la plus faible part, à un si grand résultat! C'est dans ce but que j'avais entrepris ce travail. L'accueil favorable fait à la première édition m'encourage à donner celle-ci. Je ne me suis pas borné à récueiller les actes accomplis depuis dix ans; j'ai cru devoir retoucher avec le plus grand soin toutes les parties de mon ouvrage.

This same amiable object of combining an European confederation against England, is avowed in a still more distinct manner, by M. Hautefeuille, in a paper published by him in the *Revue Contemporaine* for January 1862: —

D'un autre côté, la seconde puissance navale du monde, celle qui, depuis plus d'un siècle, a fait les plus constants efforts pour assurer à toutes les nations la liberté et l'indépendance sur l'Océan, la France semble, comme ses intérêts bien entendus l'y portent, devoir rester neutre dans toute lutte maritime prochaine. Avec ses forces, avec sa loyauté bien connue, elle deviendra la tête de la nouvelle coalition de neutralité armée, en même temps qu'elle sera l'un des plus fermes appuis des principes libéraux qu'elle a si énergiquement soutenus. Autour d'elle viendront se grouper toutes les autres nations maritimes, qui, ainsi réunies, formeront un ensemble assez formidable pour contrebalancer la supériorité navale des belligérants. Dans cette ligue puissante, tous les membres trouveront la sécurité de leur commerce international, la garantie de leur indépendance, sans être jamais exposés à se voir entraînés, malgré eux, à prendre une part active dans une lutte à laquelle ils sont et désirent rester étrangers. L'équilibre maritime, si important pour le repos et la liberté de l'univers, sera établi. Formé en

prévision de la guerre, il subsistera pendant la paix et deviendra un élément définitif des relations internationales des peuples civilisés.

L'Angleterre, pas plus qu'aucune autre nation, ne saurait se montrer offensée de la formation de la ligue de neutralité armée. Si, comme on doit le supposer, elle a l'intention de se conformer aux lois générales des nations et d'exécuter fidèlement et loyalement toutes les conventions qu'elles a consenties, l'union des neutres ne peut lui causer aucun préjudice, lui porter aucun ombrage. Cette association ne peut demander, et ne demandera en effet, que l'exact accomplissement des devoirs bien connus des belligérants, des règles de la jurisprudence internationale. Dans le cas où elle rencontrerait chez un peuple d'injustes prétentions, ce serait un motif de plus de réunir les forces isolées des neutres contre l'ennemi commun.

The author starts with loud professions of perfect impartiality:—

L'auteur qui entreprend un pareil travail doit se dépouiller complètement de tout esprit de nationalité; il doit se considérer comme citoyen de l'univers et se montrer impartial envers tous, parce que tous les droits, quels qu'ils soient, doivent trouver en lui un interprète consciencieux, un avocat dévoué. J'ai fait tous mes efforts pour remplir ce devoir, je crois y être parvenu; si cependant on aperçoit quelquefois le citoyen français, on me le pardonnera sans doute en pensant que l'amour de la patrie est le sentiment le plus vivace au cœur de l'homme.

M. Hautefeuille may make himself easy; 'Le citoyen français' will not fail to be recognised. He is mistaken in supposing that love of his own country is the 'sentiment le plus vivace' which animates his breast. In his soul there is another still more living principle, in the hatred of one other nation. If M. Hautefeuille is a 'citoyen de l'univers,' he inhabits that terrestrial globe which the first Napoleon endeavoured to create, in which the unsymmetrical contour of the British Isles was to be blotted out.

Let us see how this author commences to perform his task of impartiality towards all. The following passages are a fair sample of the moderation and accuracy with which this judicious author betakes himself to his office:—

Depuis longtemps l'Angleterre désirait mettre le pied sur le territoire chinois, bien assurée qu'elle pourrait ensuite facilement s'étendre dans ce vaste empire, et qu'une fois établie sur un point, il serait facile à ses sujets de faire la contrebande sur une large échelle. L'empereur de la Chine s'opposait au commerce de l'opium: il refusait d'empoisonner ses sujets. La Grande-Bretagne saisit ce prétexte, et déclara la guerre à un souverain qui avait l'audace de lui refuser la faculté de réaliser d'immenses bénéfices et de repousser un commerce avantageux pour elle. L'issue de cette guerre est

connue de tous: les Anglais obtinrent le commerce de l'opium, plus l'établissement de Hong-Kong, objet de leur convoitise.

And again:—

Depuis plusieurs années, quelques-uns de ces sectaires, plus ou moins sincères, dont l'Angleterre abonde, s'élevaient avec violence contre le commerce des esclaves, connu sous le nom de traite des nègres; le gouvernement s'empare de cette idée; affublé du double manteau de la religion et de la philosophie, il prêche une croisade contre les négriers. Le seul moyen de les détruire, disaient ces hommes si pieux, était le droit de visite concédé à la Grande-Bretagne par tous les peuples navigateurs. Cet expédient fut imposé aux nations secondaires, et mis à exécution par la force, même contre des peuples faibles qui n'avaient pas consenti notamment contre le Brésil. Pendant quinze ans, la France résista: enfin, en 1831 et en 1833, elle eut la faiblesse de signer un de ces traités inqualifiables qui resta en vigueur jusqu'en 1842. A cette époque, l'opinion publique força le gouvernement à la rompre; il fut remplacé par un acte de 1845 qui est moins attentatoire à la dignité nationale, mais qui cependant à la visite a substitué la vérification du pavillon.

La meillure preuve que l'on puisse donner du peu de sincérité du gouvernement anglais dans cette question est la manière dont il souffrit que ses sujets prissent à la côté d'Afrique des nègres libres pour les transporter dans les colonies britanniques sous le nom d'engagés volontaires. Cette traité, déguisé sous un faux nom, se faisait sous les yeux des autorités et des croiseurs, au moyen de procédés dont l'atrocité laissait bien loin derrière elle les plus grandes cruautés des négriers. Les Anglais ont renoncé à ce système, parce qu'il ne produisit pas les bénéfices que s'en étaient promis les traitants.

I will give just one more specimen. The declaration of the Congress of Paris of 1856, opposing some difficulties in the way of M. Hautefeuille's theory of English selfishness and baseness, he treats the subject in the following fashion: —

Cependant et tel qu'il est ce traité est un immense progrès; on doit le considérer comme une conquête très-importante, comme un premier pas fait vers l'équilibre maritime. L'Angleterre a enfin rompu le silence obstiné qu'elle gardait depuis un demi siècle; elle a reconnu deux principes qu'elle refusait d'appliquer; il est vrai qu'en échange elle a obtenu une concession qui est pour elle du plus grand intérêt l'abolition de la course, concession mauvaise pour la France et pour toutes les autres nations, et dont l'Angleterre seule profite. Mais ces principes que le cabinet de St. James vient de proclamer, il les avait déjà proclamés dix fois dans les traités les plus solennels, et jamais il n'a consenti à les exécuter. Toujours, dès que les hostilités ont commencé, il les a violés. Le traité de Paris de 1856 sera-t-il plus respecté que ceux d'Utrecht, de Versailles, de Paris (1786), &c. &c.? En examinant le passé, la réponse serait facile à faire; on pourrait affirmer que la Grande-Bretagne violera ce traité comme les autres, si elle y trouve son intérêt. Mais il n'y a pas besoin de se jeter dans des hypothèses pour pré-

voir la conduite de cette puissance; elle-même s'est chargée d'en instruire l'univers. Quelques mois à peine se sont écoulés depuis la signature du traité, et déjà les stipulations dont nous nous occupons ont été, en plein parlement, déclarées inexécutables; des hommes d'état ont affirmé que les dispositions de cet acte portaient un coup mortel à la puissance maritime anglaise, et les ministres n'ont trouvé aucun moyen de défendre le traité que l'un d'eux avait signé à Paris. Ainsi donc les autres puissances sont prévenues, à l'avance, la Grande-Bretagne se trouvera dans la nécessité de violer les conventions de 1856.

One can understand, and even excuse, violence of language and distortion of facts in the pamphleteers of the Armed Neutrality, or the sycophants of Napoleon, in the days of the great war, when the passions of men were excited to the highest pitch, and it was almost the part of patriotism to vilify the foe; but that such a book as M. Hautefeuille's should have been produced in a country professedly in alliance with England, and whose Government has consistently acted with us in the most perfect sincerity and good faith, is wholly unintelligible.

When the American War broke out, M. Hautefeuille advised himself to put forth a pamphlet, dated in 1861, which contains a sort of abstract of his system, and is coated with the efflorescence of his bile. Some observations will be found in these letters on this most unsound and offensive publication. For the present purpose, I shall content myself with a single quotation: —

La France, nous osons l'espérer, *ne reniera pas sa politique séculaire,* elle n'oubliera pas qu'elle a lutté pendant bien longtemps pour établir ce droit maritime que l'on (i. e. of course la perfide Albion) cherche à anéantir aujourd'hui, *non pas il est vrai par des actes patents et ouvertement proclamés, mais par des interprétations perfides, par des menées habilement cachées.* Aujourd'hui comme toujours elle réclamera hautement l'exacte et complète exécution des traités de la part des belligérants; elle *restera ce qu'elle a toujours été, le plus ferme appui des nations secondaires de l'Europe et de l'Amérique,* qui n'ont pas assez de force pour exiger des Etats-Unis la saine interprétation des conventions par eux conclues, mais qui *se groupperont avec reconnaissance autour de la puissance protectrice du droit.*

Now I have no desire to embark in recrimination against a country for which I entertain a sincere respect, and whose Government on recent occasions seems to me to have acted towards Great Britain with great friendliness and the best possible faith. But it is impossible to tolerate statements so injurious and so false as those of M. Hautefeuille without a protest

and without an exposure; if a man chooses to stigmatise me as a villain, and to hold himself up as a pattern of honesty, and, still more, to invite all the world to combine with his virtue in order to pull down my rascality, the meekest and most placable of mankind would feel called upon to assert their own character, and examine the pretensions of those who thus attack them. Now really the claims of a Frenchman to set up France as the model patron of neutral powers against the perfidious machinations of Great Britain—to assert that its *politique séculaire* has been the defence of the *nations secondaires* of Europe, and the invitation to the feebler States to group themselves about the *puissance protectrice du droit*—make up an historical fable which is so supremely ridiculous, as almost to make one forget its offensiveness.

One might have supposed that the partial penitence which even M. Hautefeuille in his larger work is compelled to express at the conduct of France for the best part of two centuries (*Tit.* x. cap. i. § iii. vol. 2, p. 326 et seq.), might have taught him the propriety of adopting a more modest and truthful tone. Let us see what has been the *politique séculaire* of France towards neutral nations which entitles it to assume this bullying language, and to proclaim itself in contrast with Great Britain as the *nation protectrice du droit.*

The following sketch of the conduct of France in these matters is principally taken from an author whose neutral sympathies will not be doubted, I mean M. Schoell, the distinguished Prussian publicist, in his well-known and learned *History of the Treaties of Peace.* The fourth volume commences with a chapter on the events which preceded the armed neutrality. M. Schoell writes as follows:—

La Grande-Bretagne reconnut le principe de la liberté du pavillon neutre par ses traités de 1642 et 1654 avec le Portugal. Cromwell y souscrivit dans le traité de Westminster de 1655 avec la France; cette liberté fut de nouveau proclamée dans le traité de commerce entre cette puissance et la Grande-Bretagne du 24 fév. 1677. Elle fut sanctionnée dans le traité de commerce du 23 mai 1667 avec l'Espagne, et dans celui du 18 juillet 1670, de même que dans les traités de commerce avec la république des Provinces Unies de juillet 1667 et de déc. 1674. (Vol. iv. p. 19.)

Now mark what follows in this sketch of European opinion

and legislation, and observe what was the conduct of the champion of neutral rights and the *nation protectrice du droit*, whose *politique séculaire* M. Hautefeuille so invidiously extols:—

L'orgueil de Louis XIV rendit vains tous les efforts que les Hollandais avoient tentés pour faire prévaloir les nouveaux principes. Ce fut à l'époque où il vit sa marine accrue à 100 vaisseaux de ligne et à près de 700 autres vaisseaux de guerre, armés de 14,000 canons et de 100,000 matelots, que, se regardant comme le maître des mers, ce monarque publia la fameuse ordonnance de 1681, dont, au mépris des traités, l'article 7 du 3e livre de la 9e section dit: 'Tous navires qui se trouveront chargés d'effets appartenans à nos ennemis, et les marchandises de nos sujets ou alliés qui se trouveront dans un navire ennemi, seront pareillement de bonne prise;' ou, en d'autres termes, 'Le pavillon neutre ne couvre pas la marchandise, tandis que le pavillon ennemi rend ennemi la marchandise neutre.' Le gouvernement françois ne s'arrêta pas là: dans la guerre pour la succession d'Espagne, il établit une nouvelle maxime, d'après laquelle la qualité de la marchandise ne dépendit plus de celle du propriétaire; mais toute production du sol ou de l'industrie de l'ennemi, quel qu'en fût le propriétaire, fut frappée de confiscation. Souvent même on étendit la saisie aux navires neutres qui, après avoir pris leurs chargemens dans les ports ennemis, alloient vers un port autre que ceux de leur propre pays.

La Grande-Bretagne crut devoir mettre à ces excès un frein salutaire par le traité d'Utrecht. Voici ce que stipulèrent les arts. 17 et 18 du traité de commerce et de navigation qu'elle signa avec la France le 11 avril 1713. . . . . (pp. 20, 21.)

'Il auroit été à souhaiter que ces principes eussent dès-lors remplacé l'ancien droit maritime; mais la France, contre laquelle ils avoient été mis en avant, crut de sa dignité de s'opposer à ce qu'ils ne prissent racine; et la Grande-Bretagne qui, après la paix d'Utrecht, devint la dominatrice des mers, trouva de son intérêt de les étouffer. . . .

'Elle soutint que la législation maritime d'Utrecht entroit dans la classe des conventions de cartel, et que l'obligation pour la Grande-Bretagne de s'y conformer n'ayant eu lieu qu'en vertu d'un traité, avoit expiré avec ce traité, puisque les conventions suivantes ne l'avoient pas renouvelée.'

Ce qui vient à l'appui de cette thèse du gouvernement anglais, c'est que les principes énoncés dans les articles 17 et 18 ne se trouvent que dans les seuls traités que la France a signés à Utrecht avec la Grande-Bretagne et les Etats généraux, et ne sont répétés dans aucun des autres traités, dont l'ensemble est communément appelé *Traité d'Utrecht*.* Le traité de paix du 13 juillet 1713, entre l'Espagne et la Grande-Bretagne, fut, comme celui entre cette puissance et la France, suivi d'un traité de commerce qu'on signa le 9 décembre 1713. Le silence absolu que cette convention observe à l'égard du principe d'après lequel le pavillon couvre la marchandise, paroît bien indiquer qu'on ne le regardoit pas comme une loi généralement établie. . . .

* This acute and important remark is due to M. Gentz, the eminent Austrian statesman.

Quant à la France, on auroit dit que les principes libéraux proclamés à Utrecht lui pesoient, tant elle s'empressa de se délivrer d'entraves que bientôt elle alloit regretter. Le traité de commerce qui fut conclu, en 1716, avec les villes hanséatiques, en fournit un exemple. L'article 22 de cette convention statue que les marchandises appartenant aux ennemis du roi et qui seront trouvées sur des vaisseaux des villes hanséatiques, seront confisquées. . . .

Nous trouvons, dans les soixante-six ans qui se sont écoulés entre la paix d'Utrecht et la neutralité armée, un seul traité par lequel la France ait reconnu le principe de la liberté du commerce neutre. . . .

L'ordonnance de Louis XV, du 21 octobre 1744, déclara de bonne prise non seulement les marchandises ennemies trouvées sur un navire neutre, mais aussi en général toutes les productions du sol ou de l'industrie ennemi, à l'exception de celles qui seroient trouvées sous pavillon hollandois ou danois. (pp. 24—27.)

Indeed, it may be said that down to the time of the American War of Independence the French belligerent code and practice was more harsh and severe than that of any nation in Europe. So much for the *politique séculaire* of the protectress of feeble nations. But to continue our quotations from M. Schoell:—

A l'époque de 1778, la France n'accordoit pas au pavillon neutre la prérogative de couvrir la marchandise ennemie. En veut-on une preuve sans réplique? Qu'on honore le traité de commerce que le baron de la Houze, ministre de Louis XVI, près le cercle de la Basse-Saxe, conclut le 18 septembre 1779, à Hambourg, avec le plénipotentiaire du duc de Mecklembourg-Schwérin, le baron de Lützow. En voici l'art. 15:—'Les marchandises de contrebande . . . . . , ainsi que tous les effets, denrées et marchandises généralement quelconques, appartenant aux ennemis du roi, qui se trouvent sur les navires du dit duché, seront confisqués.' Telle fut donc la législation de la France en 1779; ce n'est qu'en 1780 que nous la verrons subitement changer de langage.

La simple exposition de ces faits suffit pour démontrer la futilité du rapport que le ministre des affaires étrangères de Buonaparte fit à son maître, d'après le *Moniteur* du 16 mars 1812, où il est dit que les droits de la neutralité maritime ont été réglés solennellement par le traité d'Utrecht, devenu la loi commune des nations, et que cette loi a été textuellement renouvelée dans tous les traités subséquens. La thèse avancée par ce ministre devint dès-lors un article de foi dont il n'auroit pas été permis de douter, sans être proclamé ennemi du grand Empire. (Ibid., p. 29).

Anyone who has studied the writings of M. Hautefeuille will fully appreciate the importance of this exposition of the real character of the Treaty of Utrecht, and the parties at whose instance its liberal enactments were introduced. Among the preposterous and unfounded assumptions on which this writer

erects his singular superstructure of error, there is none more extraordinary or more pervading than his doctrine as to the Treaty of Utrecht. This treaty, destined to be so short-lived in its operation, according to M. Hautefeuille, is neither more nor less than the basis of the modern law of nations: one example of this assertion will be found in the chapter on Contraband, vol. ii. p. 87. But this is only a single instance; the same thing is repeated over and over again, and it is even asserted—with what truth M. Schoell has shown—that this liberal legislation was the work of France. How France should have been in a position to dictate the terms of the Treaty of Utrecht, it would puzzle even M. Hautefeuille's ingenuity to demonstrate. It was some time before I was enabled to discover the origin of this extraordinary historical fable; but this passage of M. Schoell conducted me at once to its true source. In the year 1812, when Napoleon was already embarked on his suicidal expedition to Russia, and when his ambition had culminated in insanity, it was his habit to put forth in the *Moniteur* documents directed against his enemies which were intended to excite the exhausted spirits of France and to supply the failure of enthusiasm by a succedaneum of hatred. So notorious had the mendacity of the official journal at that period become, that M. Thiers, in one of his recent volumes, tells us that Napoleon was obliged to procure letters from the army to be written by private persons for publication, because no one, either in France or out of it, would give credence to his bulletins. It was at this moment, in order to inflame the passions of the country against England, that the Emperor caused to be inserted in the *Moniteur* a report on the conduct of England which perhaps, for audacity of misstatement, exceeds any of the performances which ever saw the light in that least veracious of publications. This document will be found in Martens' *Nouveau Recueil*, vol. i. p. 530. The first two paragraphs of this monstrous production are as follows:—

Les droits maritimes des neutres ont été réglés solennellement par le traité d'Utrecht, devenu la loi commune des nations.

Cette loi, textuellement renouvelée dans tous les traités subséquens, a consacré les principes que je vais exposer.

The first statement is wholly unfounded in principle; the second is simply false in fact. But such trifling objections were of little consequence to the editors of the *Moniteur* in 1812. An answer to this paper was put forth by the British Government on April 21, 1812; it will be found in the same volume (p. 542). I have unfortunately not had access to the paper of M. Gentz, cited by Schoell, on the subject of this French manifesto which would no doubt be highly deserving of attentive perusal. From the moment I read this manifesto in the *Moniteur*, I possessed the key to the whole *système* of M. Hautefeuille. It is quoted everywhere by him as a document of the highest authority, and his three volumes are really neither more nor less than a verbose expansion of this mendacious diatribe against Great Britain. The reader may therefore judge of the accuracy, logic, and good faith of a work which is really built on the foundation of the veracity of the *Moniteur*.

We have thus seen what was the policy of the *nation protectrice du droit* under the ancient monarchy until the date of 1780. I am ready to concede to M. Hautefeuille, that for the succeeding decade the French Government found it expedient for a short time to change its policy. The maritime supremacy of England had induced the enfeebled authority of France to seek refuge in an attempt to subvert the law of nations, by cutting down the maritime rights of belligerent powers. The accession of France for a short period to the doctrines of the armed neutrality, and the perfidious policy by which she contrived the consummation of the American Revolution, were two masterpieces of statecraft, by which she sought to humiliate the reputation and weaken the force of her formidable rival. Baron Charles Martens, in his valuable collection of State Papers (*Nouvelles Causes célèbres*, Cause iv. p. 498), compliments the French Government on their cleverness at this period with a delicate irony, which leaves it sufficiently apparent what was his opinion of their good faith.

En laissant au lecteur impartial et sincère à juger de la solidité des plaintes, comme de celle de la justification des deux puissances, nous nous bornons à dire, ainsi qu'un auteur moderne s'est exprimé sur la conduite qu'a tenue la France en cette occasion, que le cabinet de Ver-

sailles déploya une profonde politique, et une habileté peu commune dans l'exécution du plan, de vouloir servir de guide aux colons anglais, et les conduire ouvertement à l'indépendance. On peut même avancer que dans aucune affaire, quelque importante qu'elle fût, ni dans aucun temps, le gouvernement français ne fit preuve d'autant de sagacité et de constance. Il opéra sourdement tant qu'il était périlleux de se découvrir; et il marcha à visage découvert dès que les succès des colons eurent permis de voir en eux des alliés sûrs. Il entra dans la lice, lorsque ses armées, et surtout ses flottes, furent prêtes; lorsque tout enfin lui promettait la victoire.

What the judgement of the *lecteur impartial* on this question will be, I confess I have little doubt. The French monarchy was soon to pay a bitter penalty for its perfidious and insincere alliance with Revolution. The vengeance of England—if England had desired vengeance—had not long to wait.

During the few years in which the lofty doctrines of the rights of man prepared the way for that deluge of blood and that universal triumph of tyranny to which the French Revolution gave birth, the ideas which Franklin happily called 'my Quaker doctrines,' became popular with the French philosophers, and were adopted by the French Government. France was too much occupied with the dreams of perpetual peace, which was so soon to result in the stern reality of universal war, to take much heed of the preservation of belligerent rights. America and France had but one common desire, one common aim, in which all other considerations were merged,—viz., the humiliation of Great Britain.

But the scene was soon to change. The 'Quaker doctrines' had brought forth their inevitable results; the rights of man, then as now, had dissolved the bonds of civil society; and the theory of independence then put into practice flung Europe, as it has done America in our day, into the seething caldron of internecine hostility. The Great Revolution was to abandon the millennium of peace, fraternity and philanthropy, and to vindicate the rights of freedom by the sword. Let us see how the *nation protectrice du droit* conducted herself when she once more became a belligerent.

Abundant information will be found upon this subject in the first chapter of the sixth volume of M. Schoell's work. This paper has already extended to too great a length to admit of

more than a very few extracts. It is the favourite thesis of M. Hautefeuille, that wherever France has by any accident deviated from the true path, England has always been the aggressor. Let us hear the Prussian publicist on this point.

Les principes monstrueux proclamés d'abord par le gouvernement énergumène de la France, et retorqués ensuite par celui de la Grande-Bretagne, menaçoient de plonger l'Europe dans la barbarie du moyen âge.

Qu'on se rappelle la manière dont les tribunaux étoient composés en France à une époque où l'ignorance et l'opprobre étoient des titres pour réclamer, des fonctions publiques et l'on croira sans peine que des actes d'injustice sans nombre durent être commis par de tels magistrats appelés à prononcer dans des questions aussi difficiles que celles que présentent les causes relatives aux prises. (Vol. vi. pp. 8, 9.)

Speaking of the decree of May 9, 1793, for the seizure of neutral vessels, the same writer says:—

Par ce décret la France ne renversa pas seulement les principes de la neutralité armée auxquels le ministère de Louis XVI avoit si vivement applaudi et qui proclamoient libres les marchandises chargées sous pavillon neutre, mais elle viola même les stipulations des traités. (*V.* treaty between France and Denmark, Sept. 30, 1749.) Si la Grande-Bretagne avoit avant la France mis en pratique les maximes énoncées dans ce décret, au moins elle ne fut pas inconséquente et ne viola aucun traité. Elle ne fit que suivre un système qu'elle avoit toujours professé, ou auquel elle n'avoit au moins jamais renoncé. (*Ibid.*, pp. 10, 11.)

Let us proceed to the next scene of the Revolutionary Government: —

Mais les injustices qui pouvoient avoir été commises par ce gouvernement n'étoient rien en comparaison de cette suite d'actes arbitraires que se permit le directoire exécutif, dont le règne commença en octobre 1795. L'arrogance de ces magistrats, qu'aveugloient les succès de leurs armées, ne se montra jamais mieux que dans leurs rapports avec les états neutres. Ils s'étoient persuadés que les négocians de ces pays s'étoient concertés avec les Anglois pour fermer à la France toutes les sources du commerce; ils ne voyoient d'autre moyen pour mettre fin à la détresse de denrées où se trouvoit la république que la ressource que leur offroient les captures de leurs corsaires; en conséquence, ils les favorisèrent aux dépens de la justice et du droit des gens. (Vol. vi. p. 42.)

Les pays étrangers ont retenti des plaintes que les propriétaires de bâtiments ont portées contre les juges françois chargés de prononcer sur des questions de prises. En admettant que ces plaintes soient fondées, il est permis d'attribuer une partie des injustices dont on accuse ces tribunaux, à la précipitation prescrite par la loi du 23 mai 1798, qui ne permettoit pas toujours de reconnoître la vérité. Mais nous ne trouvons pas d'excuse pour une décision rendue par le ministre de la justice de cette époque dans l'affaire

du navire *la Juliane*, amené à Bordeaux. Cette décision chargea le commissaire du pouvoir exécutif, au tribunal du département de la Gironde, d'établir dans ses conclusions que le traité de commerce conclu le 23 août 1742, avec le Danemark, pour quinze ans, avoit cessé d'exister en 1757. Ce célèbre jurisconsulte ignoroit-il l'existence de la convention de 1749, qui avoit indéfiniment renouvelé le traité de 1742? Sa décision coûta aux Danois plus de 12 millions de francs; mais elle guérit les neutres de la confiance qu'ils étoient tout disposés à accorder au directoire.

Si les décrets par lesquels le gouvernement françois fit prohiber l'introduction des marchandises angloises étoient insuffisans pour atteindre le but auquel on visoit, et plus destructeurs de la prospérité de la France que de celle de la Grande-Bretagne, au moins ces lois ne sortoient pas de la classe des réglemens de police que chaque état est en droit de publier. Il n'en fut pas de même de quelques autres lois dont nous allons parler. Lorsqu'on s'aperçut que celle du 31 octobre 1796 n'avoit pas produit l'effet qu'on s'en étoit promis, et que le commerce anglois n'avoit rien perdu de son activité, le directoire exécutif, loin de reconnoître son erreur, se persuada que la faute venoit de ce que cette loi n'étoit pas assez sévère. Pour être conséquent, il fit rendre la loi du 18 janvier 1798, qui établit le principe monstrueux que l'état des navires, en ce qui concerne leur qualité de neutre ou d'ennemi, sera déterminé *par leur cargaison*; qu'en conséquence tout bâtiment trouvé en mer, chargé en tout ou en partie de marchandises provenant d'Angleterre ou de ses possessions, sera déclaré de bonne prise, quel que soit le propriétaire de ces denrées ou marchandises. Tout navire étranger, ajoute la loi, qui dans le cours de sa traversée sera entré dans un port d'Angleterre, ne pourra être admis dans un de la république françoise, si ce n'est dans la nécessité de relâche.

Après cette loi, qui n'est autre chose qu'un ordre adressé à toutes les puissances européennes de renoncer au commerce avec la Grande-Bretagne, on ne pouvoit plus répondre de la sûreté d'aucun bâtiment, puisque, dans le cas même où toute la cargaison consisteroit en marchandises de pays neutres, le moindre objet de fabrication angloise trouvé sur un navire l'exposoit à être condamné. Voici un fait que nous citons d'après une très-bonne source. Le tribunal du département du Nord condamna, par jugement du 29 juillet 1798, le navire danois *Marie-Charlotte*, capitaine Raaslöf, parce que le capitaine, forcé par le mauvais temps de relâcher à Falmouth, y avoit chargé *un coupon de tapis* (ce sont les termes du jugement) et six tonneaux de bière à l'usage de ses équipages. Cette législation produisit un résultat auquel on ne s'attend pas à la simple lecture de la loi; c'est qu'il étoit impossible de procéder en pleine mer à la vérification qu'elle prescrit: ainsi les armateurs, dont l'avidité avoit trouvé jusqu'alors un frein salutaire dans la nécessité de faire valoir au tribunal au moins un prétexte plausible qui les justifiât d'avoir arrêté un bâtiment dans sa course, furent maintenant autorisés à conduire dans un port françois tout navire qu'ils rencontreroient. (pp. 45—47.)

The text of these decrees will be found in Martens' *Recueil*,

vol. v. pp. 357—400. I will just cull a few flowers from this *parterre* of jurisprudence and legislation: —

26 mai 1794.

La Convention Nationale, après avoir entendu le rapport de son comité de salut public, décrète: —

(1) Il ne sera fait aucun prisonnier anglois ou hanovérien.

(2) L'adresse et le décret seront insérés au bulletin et envoyés à toutes les armées.

So much for French ideas in the era of her regeneration as to the laws of civilised war.

But to return to a point more nearly concerning our present subject. Let us see how, at a late period, France treated the rights of neutral nations. On January 18, 1798, was passed the following law: —

(1) L'état d'un navire en ce qui concerne la qualité de neutre ou d'ennemi est déterminé par sa cargaison.

En conséquence, tout bâtiment chargé en tout ou en partie de marchandises angloises est déclaré de bonne prise, quel que soit le propriétaire des dites marchandises.

(2) Tout bâtiment étranger qui dans sa traversée aura relâché en Angleterre, ne pourra entrer en France si non dans le cas d'une relâche forcée.

This atrocious edict was not repealed till December 20, 1799. I reserve, as a final *bonne bouche*, the decree of October 29, 1798: —

Le Directoire exécutif, sur le rapport du ministre des relations extérieures, considérant que les escadres, armements en courses, et navires de l'Angleterre et de la Russie sont en partie équipés par des individus étrangers.

Considérant que cette violation est un abus manifeste du droit des gens, et que les puissances de l'Europe n'ont pris aucun mesure pour le faire cesser,

Arrête:

(1) Tout individu natif ou originaire de pays amis alliés de la république françoise ou neutres, porteur d'une commission donnée par les ennemis de la France ou faisant partie des équipages des bâtimens de guerre et autres ennemis, sera par ces seuls faits déclaré pirate, et traité comme tel, sans qu'il puisse dans aucun cas alléguer qu'il y a été forcé par violence, ménace, ou autrement.

Les dispositions contenues en l'article 1, seront notifiés aux puissances neutres ou alliées de le république françoise. Le ministre des relations extérieures est chargé de l'exécution du présent arrête, qui sera imprimé au bulletin des lois.

But this was a little too strong, even for the stomach of

France; and on November 14, 1798, a second decree was passed, not indeed revoking, but suspending its execution, and stating that 'l'époque de l'exécution sera determinée par un arrêté subséquent.'

Such was the conduct of France under the Republic. The intelligence and policy of the men who succeeded to the conduct of affairs after the fall of Robespierre taught them the necessity, if not of justice, at least of more prudent courses. The behaviour of the Government of France had brought it to the brink of war with America, and it became indispensable to conciliate neutral nations. The jurisdiction of the questions of prize was restored to the proper tribunals, and, for a time at least, the conduct of France was characterised by decency and moderation. The policy of France in these matters was confided by Napoleon, in the days when he was capable of justice and good sense, to that eminent jurist and statesman, M. Portalis, who may be considered as the real author of the 'Code Napoléon.'

The President of the 'Conseil des Prises' gives the following account of the 'Nation protectrice du droit' during the period which preceded his administration:—

Des lois impolitiques ont compromis pendant longtemps les intérêts de nos alliés et des puissances neutres; de nombreux armements qui commandoient l'intérêt et le désir de nuire à un ennemi perfide et implacable ont emmenés dans nos ports indistinctement amis et ennemis; les tribunaux chargés de prononcer sur la validité n'ont vu que la loi, et ont sanctionné l'immoralité sans égard pour le droit des nations. Nous sommes appelés citoyens par un gouvernement juste, et qui n'a besoin d'autre gloire que celle de pacifier la France à déchirer les pages de cette législation délirante.

M. Portalis adds:—

Nous avons étonné et ébranlé l'Europe par l'éclat et la force de nos armes; il étoit temps de la rassurer par nos principes et de la consoler par nos vertus.

Indeed, it was high time!

Yet improved and moderate as was the conduct of France under the short reign of the Consulate, it was still more severe in its maritime code than that of England. Mr. Reddie, vol. ii. p. 435, says:—

And yet this improved administration of international law by the Conseil des Prises, under the guidance of their enlightened adviser, differed only in

one point—although that an important one—from the administration of that law by the English Prize Courts; *and in that point the former were marked with greater severity than the latter.* Whilst the French held the carriage of hostile goods sufficient to confiscate the neutral vessel, the English all along held the captor merely entitled to the confiscation of the hostile goods, and bound to pay the stipulated freight due to the owner of the neutral vessel.

I entreat the reader to bear this passage in mind, and compare it with the language of M. Hautefeuille, in the chapters in which he treats of the history of the maxim 'free ships, free goods.'

But this lucid interval of moderation and good sense in which France nearly approximated, but did not quite attain, to the justice of England towards neutral nations, was destined to be of brief duration. France lost in M. Portalis her most distinguished judicial ornament and her truest and best political adviser. M. Hello, Avocat-General au Cour de Cassation, the biographer of Portalis, writes thus:—

C'était en 1807; les voies du Consulat étaient abandonnées; l'empire inclinait rapidement vers le despotisme; les usurpations du décret sur la loi dataient de 1806. Pour un fondateur de l'ordre légal, ennemi de l'intempérance dans le pouvoir comme dans la liberté, il n'y avait que la lutte ou l'apostasie. Il fut dispensé d'en faire un choix. Il ne vit pas le gouvernement qu'il avait aimé et servi abuser de sa force et dégénérer par la victoire. Il y avait eu de l'opportunité dans son avènement aux affaires; il y eut de l'apropos dans sa mort.

The First Consul had become Emperor, and the visions of universal empire seemed to have dethroned his reason from its seat. The first fruits of insane ambition was the establishment of the notorious 'Continental system'* by the Berlin and Milan Decrees of 1806–1807. A very good account of this monument of delirious injustice will be found in Alison's *History*, and in Mr. Manning's *Commentaries*. I prefer to take the following account of it from an author who is not open to the imputation of English prejudice. The following passages are from the work of M. Schoell, already cited (vol. ix. p. 39):—

On a décoré du titre de système continental l'ensemble de ces mesures, tantôt injustes et vexatoires, tantôt folles et extravagantes, par lesquelles le

* All the documents relating to the Continental system will be found in Martens' *Nouveau Recueil*, vol. i. p. 433—549.

chef d'un gouvernement qui n'avoit pas de marine espèra ruiner le commerce et la puissance maritime de l'Angleterre en empêchant qu'aucune production du sol et de l'industrie de ce pays et de ses colonies ne fût introduit sur le continent de l'Europe depuis Lisbonne jusqu'à St. Pétersbourg, depuis Cadix jusqu'à Constantinople,—ce système qui, aux dépens de l'indépendance, du bien-être, des droits, et de la dignité de tous les états du continent, et par la violation de toutes les propriétés publiques et particulières devoit anéantir le commerce du monde dans le vain espoir d'arracher un résultat qui, si heureusement il n'eut pas été impossible, eût pour des longues années plongé l'Europe dans la misère, la foiblesse et la barbarie. (*Expressions de M. Gentz.* Voyez le manifeste de l'Autriche, 12 août 1813.)

Le premier acte qui établit le système continental est un décret que Buonaparte rendit le 21 novembre 1806 à Berlin.

After quoting at length the terms of the decree, the same author continues :—

Tel fut le premier chaînon de cette suite de décrets et de mesures arbitraires que Buonaparte ordonna pendant sept années consécutives dans tous les pays soumis à sa domination ou à son influence. Dès-lors l'adoption de ce système devint la condition irrécusable à laquelle était attaché la paix avec la France ; le refus de l'introduire étoit regardé comme une déclaration de guerre. Ainsi pour vivre en amitié avec l'ennemi de toute indépendance nationale, il falloit que les souverains consentissent à détruire le commerce de leurs sujets et à ruiner leur prospérité. L'ignorance du tyran du continent, la bassesse de ses conseillers, qui ne furent que ses flatteurs, crurent peut-être à la possibilité d'exécuter un tel système, qui devoit arracher à l'Angleterre le sceptre des mers. Le système continental a plongé tout le continent de l'Europe dans la misère, et ruiné son bien-être pour longtemps ; il ne put détruire celui des anglais. Le continent, appauvri par le despotisme de l'usurpateur, perdit l'importance qu'il avoit eue auparavant pour ces insulaires ; leurs capitaux et leur activité se tournèrent vers des régions *où l'on ne professoit pas la liberté des mers et les droits des neutres.*

A most bitter sarcasm on French pretensions, but richly merited. The unfounded pretence that the Berlin Decree was justified by acts of the British Government in 1806 has been over and over again exposed and refuted ; the evidence on this subject will be found in a note to a subsequent letter on the Law of Blockade.

After the length to which these remarks have extended, I do not wish to go in any detail into the policy of the French Empire on these questions. Nor is it at all necessary that I should do so. The regard which was paid by the 'nation protectrice du droit' to the rights of feeble States, when her fortunes were in the hands of the murderer of the Duc d'Enghien, is suffi-

ciently notorious. I shall therefore content myself with a single specimen of French legislation in the year 1810. This instructive document will be found in Martens' *Nouveau Recueil*, vol. i. p. 522.

1. Toutes les marchandises quelconques provenant de fabriques anglaises et qui sont prohibées, existant aujourd'hui en France, soit dans les entrepôts réels, soit dans les magasins de nos douanes, à quelque titre que ce soit, *seront brûlées publiquement.*

2. A l'avenir toutes marchandises de fabriques anglaises prohibées provenant, soit de nos douanes, soit des saisies qui seroient faites, *seront brûlées.*

3. Toutes les marchandises anglaises prohibées, qui se trouveront en Hollande, dans le grand duché de Berg, dans les villes hanséatiques, et généralement depuis le Mein jusqu'à la mer, *seront saisies et brûlées.*

4. Toutes les marchandises anglaises qui se trouveront dans notre royaume d'Italie, à quelque titre que ce soit, *seront saisies et brûlées.*

5. Toutes les marchandises anglaises qui se trouveront dans nos provinces Illyriennes, *seront saisies et brûlées.*

6. Toutes les marchandises anglaises qui se trouveront dans le royaume de Naples, *seront saisies et brûlées.*

7. Toutes les marchandises anglaises qui se trouveront dans les provinces des Espagnes occupées par nos troupes, *seront saisies et brûlées.*

8. Toutes les marchandises anglaises qui se trouveront dans les villes et à portée des lieux occupés par nos troupes, *seront saisies et brûlées.*

But the time was drawing at hand when the nations of Europe were to be delivered from the benignant patronage of the 'nation protectrice du droit.' They 'grouped themselves' indeed in 1815, but it was not round the 'politique séculaire' of France. Neutral sheep may be foolish as well as timid animals, but they are not silly enough to place themselves under the guardianship of the wolf. The little Red Riding Hoods of Europe have learnt some wisdom by experience.

I wish it to be distinctly understood for what reasons I have thought it necessary to give this sketch of what M. Hautefeuille is pleased to call the 'politique séculaire' of France. I do not introduce this narrative by way of recrimination, still less do I adduce these examples as precedents in palliation of injustice. But it is necessary to teach French writers that there are two sides to this question, and to present them with a view of their own policy with which it is as well they should be acquainted. I think it is far better that in these matters bygones should be treated as bygones, and that we should all start fair. But if M. Hautefeuille chooses to found a system

of international law, and to preach a crusade, based upon an indictment against England, he must be reminded that that is a game at which two can play, and that if an enquiry is to be challenged into previous excesses and violations of international right, it is not Great Britain who will come off worst in the contrast. Beyond all other nations of the world, the traditionary policy of France has been to be violent when she is strong, and to be reasonable only when she is weak; and her conduct in maritime warfare has been a signal example of her tendencies in these respects. I am perfectly willing to meet M. Hautefeuille in the discussion of these topics upon the common ground of reason and authority. But the first element in such an argument is, that there should be a basis of equality. It is not to be tolerated that it should be laid down as a fundamental axiom of international history that France has always been in the right and England in the wrong; that France is the beneficent patron and England the odious and selfish tyrant of nations. The continental idea of *la perfide Albion* is a false and malicious libel propagated by such writers as M. Hautefeuille. It is derived from the malignity of national jealousy, and not founded in the facts of history. I do not pretend that in the fury of war and the heat of passion England may never have erred. But the cold calculating disgraceful perfidy which M. Hautefeuille and other writers habitually attribute to England is wholly alien to the morals and the temper of this people, and the imputation thus cast upon us has no just foundation in the annals of our story. It is time that this line of argument should be put a stop to, if not for fairness' sake at least for shame. If England has erred, the last Power in Europe who is entitled to fling a stone at us is that of which M. Hautefeuille is a citizen. We may be no better than our neighbours, but we have never been so bad as France. The black deeds with which a criminal ambition has scarred the face of Europe from the days of Louis XIV. to those of the First Napoleon—from the smoking villages of the Palatinate to the dark ditch of Vincennes—find no parallel in the annals of Great Britain. If France has repented of these acts, and has abjured the spirit which gave birth to them, it is well, and I should be the last to desire to revive their memory. If France desires to

appear in a new character.—as just in peace and moderate in war—I shall be happy to hail the Magdalen in her new capacity. But I demur at the outset to the light in which M. Hautefeuille presents her—of the Pharisee of Europe, who thanks God that she is not as other nations are, nor even as the English publican.

If M. Hautefeuille should think fit, in consideration of the circumstances to which I have called his attention, to reduce his work by expunging from it that portion of it which consists exclusively of vituperation against Great Britain, I think he might advantageously condense his three tomes into a volume of very moderate dimensions. On the portion of his book which would still remain, and which professes to treat of the legal part of the question, I have still some remarks to offer. It is impossible to read M. Hautefeuille's work without seeing that he is greatly dissatisfied with the existing state and practice of the law of nations. To this there can be no possible objection: every man is at liberty to have his opinion on such a subject, and to state and to support it as best he may. For anything I know there may be many things in this code which require alteration and amendment. But that a writer should be useful in the department of Law Reform, it is very essential that he should first know and ascertain what the law is, and not muddle up in a confused medley his notions of what it at present is with his project of that which it should be. The office of the *juris peritus* and the *legislatoris* are and ought to be distinct, and no good can ever come of confounding the two. Yet M. Hautefeuille's book, from the beginning to the end, is nothing but a perpetual example of this mischievous confusion. That eminent judicial writer, Jeremy Bentham—who, in spite of great defects, rendered great services to the law—fully appreciated and observed this capital distinction. When he argued against the Usury Laws he did not take upon him to assert that Usury had never been forbidden, but he showed why in his opinion the prohibition was inexpedient. M. Hautefeuille, on the contrary, thinks the best way of establishing that a thing ought to be, is to distort history, and to pervert law, by showing contrary to the fact that it has always been. He has borrowed this trick, which is neither candid nor convincing, from the early

pamphleteers of the armed neutrality, such as Hulber and others. The device is at once stale and ineffective. It is just the line of argument which was taken by the Prussian lawyers in the 'Exposition des Motifs' in the affair of the Silesian loan, which was demolished in the celebrated answer of Lord Mansfield.

But besides this fundamental error in the *morale* of M. Hautefeuille's treatment of these questions, his method itself labours under the most radical defects. He founds his whole system upon what he calls a 'primary divine law.' What this law is, or whence it is derived, I have been wholly unable to discover. M. Hautefeuille's description of it will be found at vol. i. p. 4; if the reader can comprehend it, I must confess he has the advantage over me. One of the most elementary principles of the law of war is, that one enemy may injure another to any extent he can within certain limits which the habits of the civilised world have agreed upon. To found this right, without which all war is impossible—and, consequently, all discussion of belligerent rights futile—upon some law directly emanating from God, would be preposterous, not to say profane. I have seen it said that what M. Hautefeuille intends by the 'primary divine law,' is, in fact, the code of general morality. It would lead me too far to investigate here the profound and interesting subject of the relations of morality to law. If ever my leisure permits me, I shall hope to deal with that subject in a more satisfactory manner. For the present I shall content myself by observing that law is not and never can be, nor is it desirable that it should be, coextensive with morality. There are many things which morality may command, to which law will not, and ought not, to oblige. In this distinction lies the whole difference between duties of perfect and imperfect obligation.* The students of ethics will understand the profound and practical materiality of this distinction. Dr. Whewell has well pointed out the fundamental difference between the adjective right and the substantive Right—morality has to do with the adjective, law is conversant with the substantive. To those who are familiar with these subjects, this indication of the capital vice

* A good discussion of this subject will be found in the early chapters of Rutherfurth's *Institutes of National Law.*

of M. Hautefeuille's system will be sufficient. I shall hope, at some future time, to be able to expound with greater fulness and in a way more worthy of the subject, the true relation which international law bears to international morality. For the present I must content myself by stating that M. Hautefeuille's system radically fails, in consequence of applying to questions of law a standard to which law is not amenable. It is right that a man should keep all his promises, but the law only compels him to keep those which are made for valuable consideration; yet the law is not therefore unjust; it only shows that the provinces of law and morality are not coextensive. The worst of reasoning from 'primary divine laws' is, that this method offers an almost irresistible temptation to individual vanity to substitute what is nothing else than the fancy or caprice of a single mind, for the rules which have been established by the accumulated wisdom and experience of mankind. When M. Hautefeuille, in virtue of the 'primary and divine law,' declares a long-established rule of the law of nations to be void, it is really nothing else but setting up M. Hautefeuille himself against mankind. Swift has ridiculed very happily, in the 'Tale of the Tub,' this natural proclivity of human nature. The consequences of this sort of reasoning upon morals, society, and law, were made apparent in the results brought about by the school of 'first principles,' which ushered in the French Revolution, and of which the 'Contrat Social' of Rousseau may be taken as the original type. French authors have ever since had a hankering after the same style of dealing with polities and law. When Mr. Reddie consulted Sir J. Mackintosh and Francis Horner on the subject of the work he proposed to write, these eminent jurists—certainly not deficient in a philosophical turn of intellect—advised him to start from the historical or synthetical, rather than from the speculative or analytical point of view. And in this, it seems to me, they recommended the only course which, on such subjects, can ever lead to satisfactory results. In abandoning this method, M. Hautefeuille has embarked, without compass, on a sea of abstractions, in which his common sense has foundered.

But M. Hautefeuille's work is not less defective in that part of it which professes to deal with what he calls the 'secondary

law of nations.' His classification of the secondary law is as unsatisfactory in respect of that which it does not include, as in that of which it is mainly composed. If, by the 'secondary law,' M. Hautefeuille intends to represent the ordinary and positive law of nations, his treatment of that law practically excludes its principal and most important elements. In the first place, he refuses any authority whatever to 'historical facts,' i. e. international precedents, 'Les faits historiques doivent être regardés comme n'ayant aucune force aucune influence sur le droit secondaire' (vol. i. pp. 2, 13). His definition of the 'secondary law' is as follows:—

Le droit secondaire ne comprend donc que deux éléments: l'espèce de jurisprudence formée par la réunion d'un nombre, plus ou moins grand, de traités, ayant résolu les mêmes questions de la même manière; et les rares coutumes reçues et acceptées sur certaines matières par la presque unanimité des peuples.

It will be seen that in words M. Hautefeuille does admit as part of the positive law of nations certain 'coutumes,' which, however, he is careful to designate as 'rares.' And anyone who reads his work attentively will see that practically the author regards the common law of nations as almost exclusively to be derived from the stipulations of treaties. In fact, in his article in the *Revue Contemporaine*, he expressly so confines it:—

Ces droits et ces devoirs découlent du droit des gens primitif, naturel ou divin, c'est-à-dire de ces notions du juste et du bien que Dieu a gravées dans le cœur de tous les hommes; ils découlent aussi du droit secondaire ou conventionnel, de la jurisprudence internationale, qui résulte des conventions expresses conclues par les différents peuples.

This is an old and most mischievous fallacy. It was an ingenious device originally, I believe, hit upon by Hübner to get rid of the existing law and practice of nations, and it has been largely adopted since by the school of which he is the apostle. Throughout M. Hautefeuille's work, for example, it will be found that he will take a single treaty or a batch of treaties, and finding in them certain stipulations, will conclude that these clauses are declaratory of the common law. The reasonable conclusion is exactly the opposite. The stipulations were introduced because without them the common law would make a different disposition. It would be as reasonable

to assert that the statute book is the source of the common law, whereas, as a general rule, its enactments are in derogation of that law. Instead of the conventional law of treaties being the common, it is, in fact, the exceptional law of nations. It might as well be argued that because it is customary in marriage settlements to introduce provisions to bar dower, or to settle money to the separate use of the wife, therefore, in the absence of such stipulations, the wife would have no dower, or her property would not pass into her husband's power. These propositions, simple as they appear to an English reader, have been over and over again, and are still, denied by continental publicists. If M. Hautefeuille's position, that the common law of nations is to be found in the special stipulations of treaties, is cut from under him, his whole system falls to the ground. Throughout his whole book, for instance, he assumes over and over again that the Treaty of Utrecht was declaratory of the existing, and the basis of all the subsequent law of nations. The origin and fallacy of this idea has been already exposed in a previous part of this paper. This preposterous notion of treating particular conventions as identical with the general law, has been over and over again refuted; and it is one of the most singular proofs of the perpetuity of error that it should form, as it does. the staple of the reasonings in such a work as M. Hautefeuille's. The same argument was advanced by the French Government in the days of the Revolution, in their disputes with America. France having made a treaty in 1778 with America, stipulating for the principle that the flag was to cover the merchandise, demanded that the American Government should not allow English cruisers to take French goods out of American merchantmen. The French Government argued exactly as M. Hautefeuille does at this day, that the principle of 'free ships, free goods,' had been stipulated in numerous treaties, and that consequently it was to be regarded as the common law of nations. The American reply to this claim was conclusive.

Letter from Mr. Jefferson to M. Genet, July 24, 1793.

I believe it cannot be doubted, but that by the general law of nations, the goods of a friend found in the vessel of an enemy are free, and the

goods of an enemy found in the vessel of a friend are lawful prize. Upon this principle, I presume, the British armed vessels have taken the property of French citizens found in our vessels in the case above mentioned, and I confess I shall be at loss on what principle to reclaim it. It is true that sundry nations, desirous of avoiding the inconvenience of having their vessels stopped at sea, ransacked, carried into port, and detained under the pretence of having enemy's goods on board, have, in many instances, introduced, by their *special treaties*, another principle between them, that enemy bottoms shall make enemy goods, and friendly bottoms friendly goods, a principle much less embarrassing to commerce, and equal to all parties in point of gain and loss; but this is altogether the effect of particular controlling, in special cases, the general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it. England has generally determined to adhere to the rigorous principle, having in no instance, as far as I recollect, agreed to the modification of letting the property of the goods follow that of the vessel, except in the single one of her treaty with France. We have adopted this modification in our treaties with France, the United Netherlands, and Prussia, and therefore, *as to them*, our vessels cover the goods of their enemies, and we lose our goods when in the vessels of their enemies. With England, Spain, Portugal, and Austria, we have no treaties, therefore we have nothing to oppose to their acting according to the general law of nations, that enemy goods are lawful prize, though found in the bottoms of a friend.

Letter from Mr. Jefferson to Mr. Morris, Aug. 16, 1793.

Another source of complaint with M. Genet has been, that the English take French goods out of American vessels, which he says is against the law of nations, and ought to be prevented by us. On the contrary, we suppose it to have been long an established principle of the law of nations, that the goods of a friend are free in an enemy's vessel, and an enemy's goods lawful prize in the vessel of a friend. The inconvenience of this principle, which subjects merchant vessels to be stopped at sea, searched, ransacked, led out of their course, has induced several nations latterly to stipulate against it by treaty, and to substitute another in its stead, that free bottoms shall make free goods, and enemy bottoms enemy goods; a rule equal to the other in point of loss and gain, but less oppressive to commerce. As far as it has been introduced, it depends on the treaties stipulating it, and forms exceptions in special cases to the general operation of the law of nations. We have introduced it in our treaties with France, Holland, and Prussia, the French goods found by the latter nations in American bottoms are not made prize of. It is our wish to establish it with other nations. But this requires their consent also, as a work of time; and in the meanwhile they have a right to act on the general principle, without giving to us or to France cause of complaint.

The reply of the Executive Government to M. Adet's complaints in 1796, is to the same effect:—

When such treaties exist, the Republic, by seizing and confiscating the

property of their enemies found on board neutral vessels, would only exercise an acknowledged right under the law of nations. The captures made by the British of American vessels having French property on board, are warranted by the law of nations. The force and operation of this law was contemplated by France and the United States when they framed their treaty of commerce, and their special stipulation on this point was meant as an exception to the universal rule. Neither our weakness nor our strength have any choice when the question concerns the observance of a custom of the law of nations. (*Ann. Reg.*, 1796.)

The same doctrine will be found very fully expounded in the able argument of the French Envoys, which is quoted in a subsequent paper on the subject of the 'Territoriality of the Merchant Vessel.'*

But starting from this erroneous hypothesis, that the stipulations of treaties constitute the chief part of the common law of nations, M. Hautefeuille is not even consistent with himself. Nor indeed was it possible that he should be so. In documents which are nothing more than particular and generally temporary compacts between individual nations, as might be expected, there exists every conceivable diversity of provision; but of these conflicting contracts M. Hautefeuille selects just those which happen to suit his purpose, and declares them to be in conformity with the Divine law, and consequently to be

* The subject of the relation of treaties to international law is one of great importance. It is astonishing how widely spread the erroneous views on this subject have been, especially among continental writers. Even Mr. Wheaton's *History* is by no means free from a taint of this heresy. Some valuable remarks on the subject will be found scattered about in Mr. Reddie's *Inquiries into International Law*. The Prussian Privy Councillor, Schmalz, in his *Europäische Völkerrecht*, takes a very sound view of the subject. He says, 'It must be obvious that no common or general law of nations, can be formed out of the particular treaties or conventions of single nations, however similar they may be. Those treaties can be used for the construction of the science only, in order to ascertain what has been propounded or recognised by them. And that recognised principle or basis is nothing else than custom or usage. Custom or usage, then, or what may be inferred or deduced as a consequence from a custom for cases similar to it, are the sole source of international law.' I have very little doubt that Mr. Reddie is right in attributing the origin of this error to the early German collections of treaties made by Leibnitz in his *Codex Diplomaticus*, and the great collection of Dumont, which were compiled by these authors *alio intuitu*, but which have since been erroneously regarded as the original and almost exclusive sources of international law.

the law of nations. Other treaties which do not square with this idea of his, he declares, by the authority that is in him, to be null and void. Thus the provisions of the treaty of Utrecht, according to M. Hautefeuille, are the basis of the common law of nations, and all the subsequent provisions of other treaties by which the same power varied or departed from those provisions, are to be wholly disregarded. Again, the treaties of the Armed Neutrality of 1780 and 1800, according to him, are declaratory of the common law of nations; but the Maritime Convention of 1801, by which England, Russia, Denmark, and Sweden solemnly disallowed the claims of the Armed Neutrality, is entitled to no regard. This style of reasoning is simply puerile. A long continuous course of identical stipulations in treaties may be and is strong evidence of a concurrence of opinion, but a particular policy is convenient and admissible. If the consent of these conventions is uniform and universal, they are evidence of general usage. When the compacts are diverse and conflicting, they afford no evidence whatever of consent, but only that particular nations have thought particular provisions desirable, and they leave the previous general law unaltered. Even so solemn and general a declaration as that of the Congress of Paris has not changed the common law of nations on that question with respect to the powers that were not parties to it, the best proof of which is, that privateering is at this moment practised in the American War. When a large majority of nations have agreed constantly to certain provisions, it is strong reason for urging upon the minority to consent to similar stipulations, and to adopt a policy which has been found generally expedient. The preponderance of treaty stipulations in a certain direction is an argument for law reform, not a proof of a rule of law. It will be found by the readers of M. Hautefeuille's work that these remarks practically dispose of almost all the propositions which that writer has thought fit to lay down on such topics as the Right of Search, Contraband of War, Blockade, and indeed nearly all the matters of which he treats.

But it may be asked, If it is not to be found in treaties, where is this common law of nations to be discovered? The answer is, partly in the authoritative text writers who have declared the usage of nations, but chiefly in a source of which M.

Hautefeuille is either strangely ignorant or yet more strangely regardless. Nothing is more 'conspicuous by its absence' throughout the work of M. Hautefeuille than an account of the course of judicial decision in the Prize Courts of different nations. Yet here, far more than in the acts of particular Governments, or the provisions of particular treaties, or the speculations of individual writers, is to be found the solemn record of international practice. The Prize Court is not a municipal but an international tribunal. Its office is not to carry out the interested policy of any Government, not even of its own, but to deduce the rule of right as between nation and nation. Its judges are, or ought to be, jurists of the highest intelligence, learning, and integrity. Such men were Lord Stowell, M. Portalis, and Chief Justice Story. Revolutionary France never committed a greater crime against international justice than when it transferred questions of prize to the ignorant jurisdiction of the local tribunals.

Lord Stowell, over and over again, proclaimed the solemn responsibilities of the post he so worthily filled. He prefaces his great judgement on the Swedish convoy with the following remarks :—

> In forming that judgement, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me, namely, to consider myself as stationed here, not to deliver occasional and shifting opinions, to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at *Stockholm*; to assert no pretensions on the part of *Great Britain* which he would not allow to *Sweden* in the same circumstances, and to impose no duties on *Sweden*, as a neutral country, which he would not admit to belong to *Great Britain* in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question, a question regarding one of the most important rights of belligerent nations relatively to neutrals.

In another place he says :—

> This Court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed to-

wards this country and its Government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law evidenced in the course of its decisions, and collected from the common usage of civilised States. (Edward Holm, *Rep.*, 312.)

No man was certainly more competent by his ability and knowledge, more fitted by the qualities of a just and judicial temper of mind, than Lord Stowell, to fulfill the high duties he has so well defined. I am well aware that it is the fashion of these days to sneer at Sir W. Scott. We have become so enlightened that learning and logic are become superfluous. It is assumed, as if it were a question beyond dispute, that the judicial administration of Lord Stowell was a record of tyranny and injustice. I shall not presume to eulogise a reputation which is far above the reach of my humble praise. But in answer to this ignorant and unfounded detraction of a venerable name, I will venture to quote the splendid testimony of a judge to whom I can offer no higher tribute than in citing him as Lord Stowell's peer. It is said that England, or the English Prize Courts—for it is through her Prize Courts that the country can alone act in such matters—has been the habitual and unjust oppressor of neutral nations. Let us hear what the greatest jurist of a nation which has been, what France never was, the champion of neutrality, says on this subject. The following passage is taken from the Commentaries of Chancellor Kent:—

In the investigation of the rules of the modern law of nations, particularly with regard to the extensive field of maritime capture, reference is generally and freely made to the decisions of the English courts. They are in the habit of taking accurate and comprehensive views of general jurisprudence, and they have been deservedly followed by the courts of the United States, on all the leading points of national law. We have a series of judicial decisions, in England and in this country, in which the usages and the duties of nations are explained and declared with that depth of research, and that liberal and enlarged enquiry, which strengthen and embellish the conclusions of reason. They contain more intrinsic argument, more full and precise details, more accurate illustrations, and are of more authority than the loose *dicta* of elementary writers. When those courts in this country, which are charged with the administration of international law, have differed from the English adjudications, we must take the law from domestic sources; but such an alternative is rarely to be met with, and there is scarcely a decision in the English Prize Courts at Westminster, on any general question of public right, that has not received the express approba-

tion and sanction of our national courts. We have attained the rank of a great commercial nation, and war, on our part, is carried on upon the same principles of maritime policy which have directed the forces, and animated the councils, of the naval powers of Europe. When the United States formed a component part of the British Empire, our prize law and theirs was the same; and after the revolution it continued to be the same, as far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it. The great value of a series of judicial decisions in prize cases, and on other questions depending on the law of nations, is, that they render certain and stable the loose general principles of that law, and show their application, and how they are understood in the country where the tribunals are sitting. They are, therefore, deservedly received with very great respect, and are presumptive, though not conclusive evidence of the law in the given case. This was the language of the Supreme Court of the United States so late as 1815; and the decisions of the English High Court of Admiralty, especially since the year 1798, have been consulted and uniformly respected by that court as enlightened commentaries on the law of nations, as affording a vast variety of instructive precedents for the application of the principles of that law. They have also this to recommend them, that they are preeminently distinguished for sagacity, wisdom, and learning, as well as for the chaste and classical beauties of their composition. (Kent's *Commentaries*, vol. i. p. 68.)

In the presence of such testimony as this, the reputation of the English judge may well endure the scorn of such writers as M. Hautefeuille, or the even less justifiable impertinence of the orators who prate at chambers of commerce. The complete accord between the English and American doctrine, in every point of importance in the law of nations, is the short but conclusive answer to the empty vituperation levelled at the character of Great Britain. It is well that the Americans should know that the high opinion expressed by Chancellor Kent of English decisions is fully reciprocated by English lawyers; and that American judgements on questions of international law are regarded by the profession in this country as documents of the very highest authority. So much for the accordance of English and American decisions. I have shown above that in the more enlightened period of French administration, when Portalis presided in the Conseil de Prises, the doctrines of the Consulate of France were identical with those of England and America, with the exception of a few cases in which the practice of France was more severe. Yet of the great body of authoritative law declared by the special tribunals to which the law of nations has assigned the office of recording its practice

and registering its decisions, M. Hautefeuille is almost, if not entirely regardless or ignorant. An amusing instance will be found in that writer's treatment of the claim to exemption from search put forward by the Armed Neutrality for neutral vessels under convoy. He examines the opinion of writers on this subject, and barely condescends to notice the famous judgement of Lord Stowell in these words: 'Bien que je ne puisse compter parmi les publicistes Sir W. Scott, il me paraît utile d'examiner son opinion.' As if, forsooth, the solemn decision of the greatest jurist who ever sat in a prize court was of less authority on such a question as this than all the 'publicistes' who ever lent their venal pens to the cause of the Armed Neutrality. M. Hautefeuille is astonished to find that Mr. Wheaton concurs in the doctrine of Lord Stowell, and he finds no better explanation of the fact than this: 'Malgré son caractère officiel, je ne pense pas que Wheaton soit sur ce point l'organe de la politique américaine: c'est à mes yeux une opinion privée et rien de plus.' If M. Hautefeuille had known anything of English or American law, he would have been aware that the doctrine of Lord Stowell is something more than the speculation of a 'publiciste,' and the opinion of Mr. Wheaton is founded on a sounder basis than the fancy of a private individual, or even on the policy of a Government. But the truth is very apparent; this fertile and sound source of the common law of nations is a closed book to M. Hautefeuille. It seems to me pretty evident that this French publicist either cannot read, or certainly has never studied, any works in the English language which have not had the good fortune to be translated into French. Of the invaluable work of Kent, as far as I remember, he appears totally ignorant. He quotes Wheaton, for Wheaton is a popular work in its French garb. When he cites Lord Stowell at all, it is only in extracts borrowed from Ortolan, or the French translation of Wheaton. And with the great and valuable body of American jurisprudence, he shows himself equally unacquainted. Though a great portion of M. Hautefeuille's work is borrowed from the tract of the Danish Professor Schlegel, on the case of the Swedish convoy, he seems entirely unacquainted with the learned and conclusive answers with which its reasonings have been encountered. The library of the French writer seems almost exclu-

sively confined to the copious and vituperative literature of the Armed Neutrality and the scribes of the empire, who at once supply him with vicious principles of reasoning, and furnish him with a store of inexhaustible malice against Great Britain. What, I ask, is the value of a work written in such a spirit and with such materials? What is the justice of an international libel which proceeds from such a critic?

These remarks have extended to a greater length than I intended, because it seemed to me desirable to establish, with some particularity, the grounds on which I have thought it right so strongly to condemn a work which appears to me both worthless and mischievous. M. Hautefeuille's work seems to me to combine every possible fault which can vitiate the utility and authority of a treatise on such a subject. It is avowedly wanting in that spirit of impartiality which can alone enable a publicist to approach the questions with which it deals in a temper of justice, candour, or truth. Aiming at the creation of a new system, rather than at an investigation of the law as it exists, the whole enquiry starts from erroneous assumptions, and is conducted on false principles. A standard of law is set up which is radically inapplicable to the subject-matter of which it is made the criterion. The true sources of international law are either wholly disregarded or completely perverted. The exceptional provisions of treaties are erected into the general rule of law, whilst the course of legal decision is passed over as of no account. No one can wonder if the result of a scheme thus conceived and thus carried out, is nothing less than a flagrant outrage at once on the law of nations and the good sense of mankind. A really scientific treatise on the subject which M. Hautefeuille has assumed to treat, yet remains to be written. It will be the duty of anyone who is thought worthy to undertake such a task, to establish, upon far other principles, a doctrine which will be worthy of the acceptance of nations, exactly in proportion as it is the reverse of the conclusions which M. Hautefeuille has pretended to lay down.

TWO LETTERS

ON

THE LAW AND PRACTICE OF BLOCKADE.

I.

ENGLAND AND PAPER BLOCKADE.

THE question of blockade is one of such general interest, and the principles on which it is founded are likely to occupy so much public attention, that I shall make no apology for asking your permission to discuss certain views on that subject which have been recently propounded by a foreign jurist, and which seem to me, both from the singular errors which pervade his statements, and the remarkable hostility towards this country which characterises his tone, to deserve a serious refutation. M. Hautefeuille, as is probably known to most of your readers, published, towards the close of the past year, a pamphlet entitled *Quelques Questions de Droit International Maritime.* In the second section of his essay he discusses the law of blockade. I there find the following passages, to which a more recent publication of the same author has given a prominence and importance which induce me to trouble you with this letter:—

> Comment se fait-il donc que l'Angleterre, aujourd'hui puissance neutre, consente à reconnaître un investissement de cette nature? Ne serait-ce pas que cette nation, qui a toujours, et depuis plusieurs siècles, su tirer un part si avantageux pour elle des blocus sur papier—qui a si souvent et si odieusement abusé de ce moyen, contraire à toutes les lois divines et humaines, pour ruiner les neutres—n'est pas fâchée de se reserver cette immense ressource pour le moment, qu'elle prévoit toujours, où elle sera belligérante? La manœuvre serait habile. Elle consiste à laisser aujourd'hui les Etats-Unis interpréter dans ce sens tous les traités existants, à accepter cette interprétation, à l'appliquer même à la déclaration du 16 avril 1856 — pour pouvoir se dire parfaitement fondée à suivre cette même jurisprudence lorsque la Grande-Bretagne sera elle-même engagée dans les hostilités. (P. 43.)
>
> Depuis plus d'un siècle tous les peuples, un seul excepté — le peuple anglais, ont reconnu ces principes fondamentaux du droit de blocus, et

notamment la nécessité de la réalité de l'investissement, par la présence continuée sur les lieux même des bâtiments chargés de le former. Les Etats-Unis d'Amérique, depuis leur origine, ont toujours formellement stipulé que le blocus devait être effectif. Tous leurs traités avec toutes les puissances maritimes contiennent une clause spéciale sur ce point. Elle se trouve même dans la Convention de 1794–1795 avec la Grande-Bretagne ; c'est le seul traité de cette nature que l'Angleterre ait contracté jusqu'en 1856. A cette dernière époque elle consentit à se rallier aux règles reconnues par tous les autres peuples, et, par conséquent, à renoncer aux blocus fictifs, dont elle avait fait si souvent un odieux abus. (P. 35.)

Without stopping to remark on the singular, and, as I shall presently show, wholly unjustifiable asperity of tone which is here adopted towards England, I may be permitted to condense the propositions contained in these paragraphs. The argument is this:—'England has always held and practised the doctrine of paper blockades. Till the treaty of 1856, she always refused to acknowledge the principle that a blockade ought to be effective; and now, having nominally consented to admit the doctrine held by all other nations, she is seeking to evade the obligation into which she has entered, by recognising the ineffectual blockade of the American coast, and so assisting at the creation of a precedent which may hereafter be useful to her.'

I know, Sir, all the difficulty of persuading a Frenchman that *la perfide Albion* can ever be disinterested in an action or course of policy. As in the suppression of the slave trade, French politicians insisted on discovering some sinister and concealed designs on the part of England to compass the ruin of other Powers, so, I fear, it will be to the end of the chapter; and M. Hautefeuille's language is a clear proof that French publicists are infected by the same suspicions. It is endless to discuss the motives of men or of nations, but M. Hautefeuille has here raised issues of fact on which it is easy to confute him. Before I commence to do so, let me add this writer's *dernier mot.*

In a more recent publication in the *Revue Contemporaine*, the same author has expressed the same ideas in a still more definite form:—

L'Angleterre n'a jamais voulu admettre ces principes dans la pratique. Dès qu'elle est en guerre, elle proclame le blocus de tels ou tels ports du

littoral ennemi, ou de toutes les côtes; on l'a vue même prétendre que les côtes de France étaient naturellement bloquées, par leur position géographique à l'égard des côtes d'Angleterre. La proclamation est notifiée aux nations pacifiques, qui dès-lors doivent s'abstenir de tout commerce avec les lieux ainsi mis en interdit. C'est ce que l'on a appelé le *blocus sur papier*. Le belligérant ne se met d'ailleurs pas en peine d'envoyer un seul bâtiment pour maintenir le prétendu investissement.

The same writer thus proceeds:—

Les causes alléguées par les belligérants pour justifier la violation des principes du droit maritime ne peuvent donc soutenir le plus léger examen; elles n'existent pas; leurs motifs réels, vainement dissimulés, ont été révélés par l'histoire; ils ne sont aujourd'hui un secret pour personne. Ces motifs sont: l'ambition, le désir de faire retomber sur les peuples neutres les conséquences immédiates de la guerre; la jalousie commerciale. Plusieurs fois, mais surtout au commencement de ce siècle, alors que sa prépondérance maritime était sans contre-poids, l'Angleterre a laissé voir le premier mobile qui dictait sa conduite. Elle a proclamé elle-même, dans ses ordres du conseil, ses vues ambitieuses. Nation belligérante, elle persécutait et détruisait les marines neutres pour 'conserver cette puissance maritime que, par les faveurs spéciales de la Providence, elle tient de la valeur de son peuple' (*ordre du conseil du* 19 *novembre* 1807), puissance qu'elle déclarait essentielle au bonheur et à l'indépendance du genre humain.

I think, Sir, when you read these passages, you will be disposed to exclaim with me, '*Pudet hæc opprobria nobis*,' especially when they are reproaches which are abundantly capable of refutation. A more extraordinary case of misapprehension or misrepresentation of history, of law, and of fact, I think I never remember to have encountered in a writer pretending to authority and information.

To begin at the beginning, M. Hautefeuille takes upon himself the notoriously perilous task of maintaining a negative assertion. He says that before the year 1856 England never made but one treaty (viz. that with the United States in 1795) in which she consented to recognise the doctrine of effective, as distinguished from paper, blockade. Now, if ever there was a document with which a writer on international law might be expected to be familiar, it is the great maritime convention of 1801, concluded between England and Russia, by which the long controversy between this country as the champion of belligerent rights, and Russia as the organ of the Armed Neutrality, ascertained and declared the admitted doctrines of maritime law. This treaty is, perhaps, the most important

document in the whole archives of international jurisprudence; and that M. Hautefeuille should in a popular pamphlet have appeared to assume its non-existence, is one of the most incomprehensible parts of his very unintelligible treatment of this subject. Those who wish to make themselves acquainted fully with this matter may consult Martens' *Recueil des Traités* for 1801, where all the documents are set out at length, Wheaton's *History of International Law*, and the great speech of Lord Grenville in the House of Lords, in 1801, which is one of the most memorable monuments of the abilities of that accomplished statesman. The question of blockade, of course, formed a considerable part of the discussions, which terminated in this celebrated convention. It is sufficient for me to meet the statement of M. Hautefeuille with a direct contradiction, by citing from this treaty to which England was a principal contracting party, the following definition of a blockaded port:—

> In order to determine what characterises a blockaded port, that denomination is given only where there is, by the disposition of the Power which attacks it with ships, stationary or sufficiently near, an evident danger in entering.

Now, not only did England adhere in 1801 to this satisfactory definition of an effective blockade, but I will undertake to show you that this is, and always has been, the doctrine held by English lawyers, and practised by English statesmen. The assertions so rashly made by M. Hautefeuille, that England has 'for centuries availed herself of paper blockades,' that she has asserted the right of blockade 'by proclamation, without sending a single ship to maintain it,' are wholly without foundation.

The English doctrine on this subject has always been precisely that of all other nations, and her practice has been conformable thereto. In opposition to the unjust aspersions of M. Hautefeuille, I will take the liberty to quote the following passage from the competent and impartial authority of the greatest of American jurists:—

> The judicial decisions in England and in America have given great precision to the law of blockade by the application of it to particular cases and by the extent and clearness and equity of their illustrations. They are distinguished likewise for general coincidence and harmony in their principles. (Kent's *Commentaries*, vol. i. p. 149.)

I do not wish to weary your readers by lengthened quotations, but I will reply to the imputations cast upon England by M. Hautefeuille in a single citation from a judgement delivered by the Privy Council in the year 1809 :—

> This was a leading case of several appeals from the Vice-Admiralty Courts in America and the West Indies, condemning the ships and cargoes for a breach of the blockade of the Island of Martinique in the year 1804.
>
> The Court held that to constitute a blockade the intention to shut up the port should not only be generally made known to vessels navigating the seas in the vicinity, but that it was the duty of the blockaders to maintain such a force as would be itself sufficient to enforce it. This could only be effected by keeping a number of vessels on the different stations so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island. In the present instance no such measures have been resorted to, and this neglect necessarily led neutral vessels to believe these ports might be entered without incurring any risk. The periodical appearance of a vessel of war in the offing could not be supposed a continuation of a blockade, which the correspondence mentioned had described to have been previously maintained by a number of vessels, and with such unparalleled rigour that no vessel whatever had been able to enter the island during its continuance. Their lordships were, therefore, pleased to order that the ship should be restored. (*The Nancy*, 1, *Acton's Reports*, p. 58.)

Anyone who will be at the trouble to compare the language and effect of this judgement with the view of English doctrine and practice as stated by M. Hautefeuille, will be able to judge how much weight is to be attributed to his account of the conduct of this country 'at the commencement of the present century.' I ask, is it not a little too bad that while such judgements as these are upon record, a writer of authority should venture to hold up England to the odium of neutral nations as the obstinate and interested patron of paper blockades?

'But then,' says M. Hautefeuille, 'at least I can convict you on the Orders in Council;' and he actually cites a passage from the Order in Council of November 1807. Now, if there was any topic of which a French publicist, who knew what he was about, would have been more careful to keep clear than another, I should have thought it would have been the too celebrated Orders in Council of 1807. Whatever blame may be cast upon this transaction by other nations, it certainly does not lie in the mouth of a writer who is supposed to enjoy the

confidence of the Imperial Government of France to fling the first stone at the authors of these proclamations. Has M. Hautefeuille forgotten the origin of the Orders in Council and the provocation to which they were a reply? Has he never heard of the Berlin decree? Let me recall to his recollection that memorable proclamation put forth by the ruler of that nation which he is pleased to call the 'secular' champion of neutral rights. The two first articles of the French decree promulgated at Berlin were as follows:—

Art. 1. Les Iles Britanniques sont déclarées en état de blocus.
Art. 2. Tout commerce et toute correspondance avec elle est défendu.

Here was something like a paper blockade. The year after the battle of Trafalgar, when not a single French cruiser dared to flutter the tricolour on the face of the seas, the whole British Isles were declared in a state of blockade. A more daring misstatement of fact, a grosser perversion of law, was never perpetrated by a civilized government. The Orders in Council were simply a measure of retaliation upon this outrage.

The preamble to the Order in Council of January 7, 1807, runs as follows:—

Whereas the French Government has issued certain orders which, in violation of the usages of war, purport to prohibit the commerce of all neutral nations with His Majesty's dominions, and *whereas the said Government has also taken on itself to declare all His Majesty's dominions to be in a state of blockade*, at a time when the fleets of France and her allies are themselves confined within their own ports by the superior valour and discipline of the British navy; and whereas such attempts on the part of the enemy would give to His Majesty an unquestionable right of retaliation, and would warrant His Majesty in enforcing the same prohibition of all commerce with France which that Power vainly hopes to effect against the commerce of His Majesty's subjects, &c.

I am not disposed to defend the propriety or the policy of adopting in such a case the principles of the *lex talionis*. But it is necessary to remember the origin of the Orders in Council, in order to understand the gross inaccuracy and unfairness of which M. Hautefeuille is guilty when he represents the acts which they authorized as the traditional policy and habitual practice of Great Britain. It never was asserted or pretended that the policy of the Orders in Council was in accordance with the English view of international law. On the contrary, it was

expressly admitted and affirmed that they were an exceptional and temporary departure from that law, which the conduct of the French Government had made necessary and justifiable. This is clearly stated by Lord Stowell in a well-known judgement:—

> It is a matter of universal notoriety that the French Ruler published, in November 1806, a decree, dated at Berlin (whence it usually takes its title), by which he declared the British Isles to be in a state of blockade. That the British Government, in January and November 1807, published orders of blockade. *These orders were intended and professed to be retaliatory against France; without reference to that character they would not, and could not, have been defended.* On the 26th of December following, the French Government issued an edict, dated Milan (whence it is commonly denominated), by which a still stronger pressure was imposed upon British commerce and British maritime warfare. (Edwards's *Admiralty Rep.*, p. 381.)

What was, and always has been, the English doctrine and practice on this subject, independently of the exceptional and temporary operation of these orders, is clearly pointed out by the same great judge in another case, 'The Arthur' (1 Dodson, *Adm. Rep.*, p. 425. 1809).

> This Order in Council was, among others, issued in the way of retaliation, for the measures which had previously been adopted by the French Government against the commerce of this country. *The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships and forming as it were an arch of circumvallation round the mouth of the prohibited port. Then if the arch fails in any one part, the blockade itself fails altogether.* But this species of blockade, which has arisen out of the violence and unjust conduct of the enemy, was maintained by a ship stationed anywhere on the coast, or, as in this case, in the river itself, observing and preventing any vessel that might endeavour to effect a passage up or down the river.

The Orders in Council, then, were an exceptional and temporary violation of the admitted law of nations, brought about by the original outrage of the Berlin decree. The English Government at the time of the first publication of these orders, publicly declared that they were temporary measures of retaliation, which should be withdrawn as soon as the French decrees were revoked. In effect these orders were repealed in the year 1812, having thus lasted just five years. What, then, are we to think of the fairness or the information of M. Hautefeuille, who fixes on these exceptional five years, when

England had adopted a policy forced upon her by the unjust conduct of France, in order to charge this country with the responsibility of habitually maintaining a doctrine which, in fact, she has always repudiated? The assertion that England has contended for the principle and pursued the practice of paper blockades as the rule of her maritime policy, is wholly untrue; and with the unfounded assertions on which they are based fall to the ground the injurious insinuations which M. Hautefeuille casts upon the motives of our present conduct.

What I wish your readers to understand is that, though the dissertations of this French publicist may be very useful in a discussion of what the maritime law of nations ought to be, they are entirely to be disregarded in ascertaining what it actually is. This ingenious writer seems, if possible, to caricature the unfairness of spirit and the inaccuracy of detail by which French legal discussions are too often disfigured.

Nevertheless, if this had been simply a speculative question, in which errors of fact and of theory were alone involved, without any prospect of immediate political results, I should not have ventured to trouble you with this too lengthy letter; but I find in M. Hautefeuille's contribution to the *Revue Contemporaine* the following remarkable and startling sentences:—

> It is not sufficient to lay down principles and proclaim laws — their execution must be enforced; to do so, it would be sufficient to follow the example given by the small Northern Powers, and to create, in 1862, a coalition of armed neutrality similar to those of 1669 and 1780, which, by uniting in one body all the scattered forces of all neutrals, would secure to each the respect and security which they cannot obtain while remaining isolated.
>
> England could not, more than any other nation, take offence at the formation of the league of armed neutrality. If, as we must suppose, she intends to respect the general law of nations, and faithfully and legally carry out the conventions she has agreed to, the union of neutrals cannot give her the slightest umbrage. That association cannot and will not require anything but the strict fulfillment of the well-known duties of belligerents—of the rules of international jurisprudence. In the event of meeting with unjust pretensions on the part of any nation, it would be an additional reason for the union of all isolated forces against the common enemy.

Such language as this put forth in a publication which is understood to be directly in the interest of the French Govern-

ment *donne à penser*. The practical conclusion which M. Hautefeuille ventures to draw from propositions—the falsity of which I have endeavoured to expose—is the necessity of reconstituting a European league, in imitation of the 'armed neutrality,' to coerce recalcitrant England. Coming from such a quarter, a menace of this sort cannot be neglected. I have done my best to point out how entirely without foundation are the imputations by which the French publicist seeks to hold up this country to the jealousy and odium of Europe. The conflicting claims of belligerent rights and neutral privileges were settled by mutual agreement upon a firm foundation by the great treaty of 1801, to which I have already referred. By those principles Great Britain has been, and still is, guided; and to them she is ready to be, as she always has been, faithful. If France is satisfied with these doctrines, she will not find any disposition on our side to depart from them. Indeed, in admitting the doctrine that the flag covers the merchandise, we have conceded far more than the 'armed neutrality' was able to establish. If she meditates forcing us into further concessions by such a league as M. Hautefeuille threatens, I venture to predict that the third 'armed neutrality' will not be much more successful than its predecessors. England has offered no provocation for these groundless attacks. Upon this question of blockade we have no occasion to wince, for 'our withers are unwrung.' And if we are to be made the subject of assaults of this description, I doubt not we shall be able to hold our own again as we have held it before.

I know there are some people who would gladly see the practice of blockade abolished altogether. Those who openly profess this opinion seem to me more candid than M. Hautefeuille, who, by impossible definitions, utterly unknown and repugnant to the Law of Nations, seeks indirectly to render it impracticable. All the most authoritative writers sustain the principle as one not only lawful but necessary. Kent says:—'Among the rights of belligerents there is none more clear and incontrovertible, or more *just and necessary in its application*, than that which gives rise to the law of blockade.' Bynkershoek declares that blockade 'is founded on the principles of *natural*

reason as well as on the usage of nations.' I know there are those who are for abolishing everything which has hitherto been considered to constitute the bulwarks of our maritime power. Strangely enough, on this as well as the other side of the channel there are to be found those who believe that everything which is English must be detestable, and that all which is old must necessarily be bad. I confess that it is not the conclusion to which such discussions as that on which I have too long detained you conduct me. I am rather disposed to echo the ancient text which used to be read on 'Founders' Day' at Trinity College, 'Let us praise the men of old time, and our fathers who begat us.'

II.

BLOCKADES BY CRUISING SQUADRONS.

I HAVE endeavoured to point out how entirely unfounded was the assertion of M. Hautefeuille that England had habitually maintained the doctrine and pursued the practice of paper blockades, and how completely without justification was the charge which he based upon this groundless proposition. There is, however, another point of his theory of blockade as developed in the pamphlet *Quelques Questions*, &c., which, from its erroneous and mischievous character, also merits exposure. Any one who is at all acquainted with French literature must have admired the dexterity and skill with which an author, whether he deal in historical or legal disquisitions, devotes himself to the construction of a *système*. The thing, like the word, is eminently French. M. Thiers's great book is a gigantic specimen of an historical *système*. M. Hautefeuille's pamphlet is a small illustration of the same science. To the author of a *système* facts and documents are like the clay on the potter's wheel. They are the subordinate actors in the theory, who are disposed of or dispensed with as may best suit the convenience of the dramatist.

The first proposition, with which I have already dealt, may be thus stated:—'The law of nations requires that blockades should be effective; England has always practised ineffective blockades; therefore England is a violater of the law of nations.' Now, this syllogism is disposed of at once by the summary method of disproving the minor premiss. But it will be seen that there is still some room for ambiguity as long as the word '*effective*' is not precisely defined. What, then, is an effective blockade? M. Hautefeuille's second proposition, with which I now propose to deal, may be thus stated:—'Blockades by cruising squadrons are ineffective blockades; England maintains the doctrine of blockade by cruising squadrons; therefore

England maintains ineffective blockades.' Now, in this syllogism of M. Hautefeuille's *système*, I shall take the liberty of denying the major premiss.

I will first state, in M. Hautefeuille's own words, his definition of a real or effective blockade:—

> Le blocus, pour être obligatoire, doit donc être réel—c'est à dire, *formé par des bâtiments de guerre arrêtés, et assez proches* pour assurer à leur nation la souveraineté des eaux environnantes, et par conséquent pour rendre l'entrée du port impossible sans passer sous le feu de leur artillerie. (*Quelques Questions*, &c., p. 43.)

And this he contrasts in his ordinary invidious style with 'le blocus par croisière,' which he calls 'le système anglais de blocus fictif durant les guerres des dix-septième, dix-huitième, et même du commencement du dix-neuvième siècle.' And he calls upon France (p. 47),—

> de ne reconnaître pour valables que les blocus formés par des bâtiments arrêtés, et suffisamment proches pour qu'il y ait réellement péril à tenter l'entrée; et d'exiger que tout navire marchand portant son pavillon puisse, sans être saisi ni autrement inquiété, se présenter une première fois devant le lieu investi pour vérifier par lui-même l'existence réelle du blocus.

It will be seen from these definitions that M. Hautefeuille by no means confines himself to the requirement that there should be an efficient and adequate force, to keep up the blockade; but he further insists that the ships should be stationary (*arrêtés*) as well as adequate in force and sufficiently near (*suffisamment proches*). He further demands that the neutral merchant ship, without any regard to the proclamation of blockade, should be at liberty to sail to the blockaded port in order to ascertain for itself, on the spot, the fact of the sufficiency of the blockade, without subjecting itself thereby to any penalty. This is what is called in the French text-books the *notification spéciale*. I shall deal with these two requirements separately.

The demand that the blockading force should consist of *stationary* ships, and not of a *cruising* squadron, is no new pretension. If M. Hautefeuille had reproduced this doctrine as a speculative opinion which he recommended to the acceptance of Europe, no one could have objected to hearing from an ingenious writer what was to be advanced in favour of a very

old proposition. But M. Hautefeuille is so constantly in the habit of confounding the distinct provinces of the *legislator* and the *juris peritus* that the inextricable mess in which he thus involves his subject deprives his speculations of all credit and authority. What M. Hautefeuille's unlearned readers have a right to complain of is that, professing to state what is the clear and unquestionable Law of Nations on this point, he wholly misrepresents it, and lays that down to be clearly established which, in fact, has been not only denied but solemnly resolved in the negative.

The words of M. Hautefeuille's definition (*bâtiments arrêtés et suffisamment proches*) are borrowed from the Convention of the Armed Neutrality of 1780. It remains to consider how far they have ever been admitted or incorporated into the Law of Nations; whether, in short, this novel experiment in International Law was crowned with success, or whether it remained only an abortive attempt. For that purpose it is necessary to recall in outline the story of the first and second Armed Neutrality. Those who wish thoroughly to understand that interesting and important international controversy should consult Manning's *Commentaries on the Law of Nations* (in my humble judgement by far the clearest and most satisfactory English treatise on International Law) and Alison's *History of Europe*, cap. 33. I shall content myself with a brief statement of the facts which are essential to make this particular point intelligible.

In 1780, at the instance of Russia, the Baltic Powers, encouraged by the feebleness of England, humiliated as she was and shattered by the American war, entered into a league, the object of which was, by a new code of maritime law, to abridge the established rights of belligerent nations. The motives which led to this singular intrigue, and the manner in which it was conducted, are described in a very graphic and interesting manner in Wheaton's *History*. Now, it never has been pretended by any writer of authority that the principles asserted by the Armed Neutrality were declarations of the then existing Law of Nations. On the contrary, its professed aim was the introduction of a new code, under the auspices of a combination sufficiently powerful to compel its acceptance by

belligerent powers. Though perhaps Mr. Ward's description of the transaction is still more accurate when he says that the Armed Neutrality was not so much a combination to change the Law of Nations as a conspiracy to disobey it. My present object is not to enquire whether the attempt was a meritorious one, which deserved to succeed, but whether it did in fact succeed so as to change the existing doctrine and practice of International Law. The very nature of the transaction shows that it was not of the character of a synallagmatic convention, which sought by universal assent to establish a new code. It was rather a hostile manifesto, the object of which was to impose its decree by force. Now, let us see what was the result. England, too weak to resist by arms, recorded her protest against a measure directed principally against herself. But the repudiation of the scheme of the Armed Neutrality was not left to her unaided efforts. The parties to that convention saved us the trouble of demonstrating the futility of their own principles. Hear Lord Grenville on this point:—

> The principles in question were, indeed, within a few years after the Armed Neutrality of 1780, renounced by the practice of almost every State which had been a party to that league.

A statement which is justified by the following note:—

> By Russia, in her war with Turkey, in 1787; by Sweden, in her war with Russia, in 1789; by Russia, Prussia, Austria, Spain, Portugal and America, in their treaties with Great Britain during the present war; by Denmark and Sweden, in their instructions issued in 1793, and in their treaty with each other in 1794; and by Prussia again in her treaty with America, in 1799.

We see, then, that this projected innovation was definitively abandoned by all the parties within twenty years of the establishment of the Armed Neutrality. So far, then, the whole affair may be treated as a mere abortive project, which effected no practical change in the principles or practice of International Law. Further information on this point will be found in Manning's *Commentaries*, p. 272.

In the year 1800, however, a new attempt was made to revive this unfortunate project under the patronage of that enlightened and humane legislator the Emperor Paul, and conventions were

signed between Russia, Sweden, and Denmark, which were in fact an amended edition of the old 'Armed Neutrality,' which had fallen still-born from the European press. Among the heads most insisted on was the definition of blockade. England was now, however, in a position to do something better than protest. She sent Lord Nelson to Copenhagen. Almost at the same moment Paul fell by the hands of assassins, and his successor immediately opened negotiations with England. These negotiations resulted in the treaty of 1801, to which I have referred in my former letters, and which M. Hautefeuille, in his pamphlet, thinks fit wholly to disregard. Now, it is impossible to conceive a more important deliberation than that which arose on the settlement of the terms of this treaty, as between England as the representative of belligerent rights on the one hand, and the Northern Powers as the champions of neutral rights on the other. All the claims of the 'Armed Neutrality' were brought under review, and the definitions ultimately agreed upon may be taken as the most solemn and conclusive adjudication upon the points in dispute by the agreement of European opinion. I will place before you the two definitions of blockade:—No. 1 is the claim as it appears in the Convention of Armed Neutrality of 1800; No. 2 is the form agreed upon in the treaty of 1801, between England on the one hand, and the Northern Powers on the other. Sweden and Denmark subsequently, by separate conventions, adhered to the treaty as concluded by Russia, and it was not necessary for America to accede specifically, for on that subject her courts have always held precisely the same doctrine as that of Great Britain:—

No. 1.—Que, pour déterminer ce qui caractérise un port bloqué, on n'accorde cette dénomination qu'à celui où il y a, par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés *et* suffisamment proches, un danger évident d'entrer. Et que tout bâtiment naviguant vers un port bloqué ne pourra être regardé d'avoir contrevenu à la présente convention, que lorsqu' après avoir été averti par le commandant du blocus de l'état du port, il tâchera d'y pénétrer en employant la force ou la ruse. (Martens, *Recueil*, vol. vii. p. 176.)

No. 2.—Que, pour déterminer ce qui caractérise un port bloqué, on n'accorde cette dénomination qu'à celui où il y a, par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés *ou* suffisamment proches, un danger évident d'entrer. (*Ibid.*, p. 263.)

After examining carefully the distinction between these two

definitions, we shall be able to judge of the result of this authoritative decision. It shows three things: (1) What the Armed Neutrality wanted; (2) what it did not get; (3) what was declared by mutual assent to be the Law of Nations.

The first part of the definition of the Armed Neutrality, it will be observed, is allowed to stand just as it is, with one important exception, viz., the change of the conjunctive *et* into the disjunctive *ou*. This change, the importance of which is obvious enough, was fully discussed at the time in the Parliamentary debates on the convention. (See the speeches of Lord Grenville and Lord Hawkesbury, in Hansard's *Parliamentary Debates*, vol. 36.) It was introduced and acceded to with the express intention of excluding the doctrine, for which the Armed Neutrality contended, and which M. Hautefeuille seeks to revive, of the necessity of a *stationary* fleet, and to reassert the established practice of blockade by cruising squadrons. In his elaborate work, *Droits et Devoirs des Nations neutres* (vol. ii. pp. 201–263), M. Hautefeuille puts himself into a great passion about this alteration, and calls it a '*jeu de mots plus digne de saltimbanques que d'hommes d'état.*' But, however much he may rail against it, he can deny neither the fact nor its cogency. It will be further observed that the last clause of the definition of the Armed Neutrality is wholly struck out; and thus a distinct negative was placed on the claim to what the French writer calls a *notification spéciale.*

Now, in this state of facts, your readers will probably be curious to know how M. Hautefeuille gets rid of the treaty of 1801, and thinks himself at liberty entirely to disregard the solemn abandonment by its authors of the pretensions asserted by the Armed Neutrality. This feat is accomplished by virtue of this ingenious publicist's *système*, which will be found developed in his treatise *Des Droits et Devoirs des Nations neutres.* A more original and singular process was probably never devised, even by a French author. According to M. Hautefeuille, all international law is divided into the '*loi primitive*' and the '*loi secondaire.*' The '*loi secondaire*' consists in the principles and practice admitted and acted upon by nations; and the special legislation introduced by treaties; in short, what by ordinary mortals is called 'international

law.' The '*loi primitive*,' however, is a much more transcendental affair: it is the '*loi humaine et divine*.' Where the institutes of this code are to be found, I have tried in vain to discover from M. Hautefeuille's writings. As far as I can comprehend them, it is a special revelation vouchsafed to the author by a Providence of exclusively Gallican sympathies. By the help of this potent instrument the '*loi secondaire*' becomes a mere plastic material in the hands of M. Hautefeuille, which he works into any shape he thinks fit. *Diruit, ædificat, mutat quadrata rotundis.* Whatever, in M. Hautefeuille's judgement, is consentaneous to the '*loi primitive*,' he roundly asserts to be, and to have always been, the 'law of nations;' but whatever part of the '*loi secondaire*' is deemed repugnant to that mysterious revelation, however much it may have been established by the consent and usage of nations, is deemed to be illegal and unjust. It is by virtue of this original and effectual 'Cour de Cassation' established by M. Hautefeuille, of which he keeps the key in his own breast, and which confirms or revokes treaties and everything else, according to its good pleasure, that this ingenious writer deliberately overrules the settlement of 1801, and re-establishes as the unquestionable and undisputed law of nations the abortive and repudiated doctrines of 1780. Anyone who reads the pamphlet *Quelques Questions*, &c., will perceive that the whole of its statements and reasonings are founded on the assumption that the principles laid down by the Armed Neutrality are, and always have been, the recognised and indisputable rules of the Law of Nations. Yet if this be so, I do not exactly understand M. Hautefeuille's anxiety to revive a league whose objects have been already so completely accomplished.

From the statements of M. Hautefeuille, I will venture to appeal to the authority of Mr. Wheaton, who certainly will not be suspected of any partial prejudices in favour of the belligerent pretensions of England. Without entirely acquiescing in all the views of that eminent writer on this chapter of history, I may quote the following passage:—

> We have thought it necessary to dwell thus minutely upon the circumstances which attended the formation of the Convention of 1801, because it may be justly considered not merely as forming a new conventional

law between the contracting parties, but as containing a recognition of universal pre-existing rights which could not justly be withheld by them from other States. The avowed object of this treaty was to fix and declare the law of nations upon the several points which had been so much contested. (Wheaton's *History of the Law of Nations*, p. 408.)

The fact that in the declaration at Paris in 1856, no attempt was made to revive the requirement of a stationary blockade, or to introduce the stipulation as to the *notification spéciale*, is the strongest additional evidence that the definition of the Armed Neutrality is finally and universally repudiated.

It is perfectly true that England does not admit the definition of an 'effective' blockade as laid down by M. Hautefeuille. But I have endeavoured to afford to your readers the opportunity of judging whether in rejecting such a definition she is guilty of wilfully violating the Law of Nations as established either by any recognised rule or by any general practice. To insist on the condition of stationary ships is simply to do that which the Armed Neutrality no doubt desired—viz., practically to abolish blockade altogether. How is a blockade to be kept up in the tempestuous seas which beat on the wintry coasts that lie between Cape Hatteras and the banks of Newfoundland by stationary ships? To forbid mobility to ships is to deprive them of that which constitutes their essence and their efficiency. You might just as well require that only dismounted cavalry should be employed in war, or that the use of horse artillery should be forbidden. This may, perhaps, be consistent with the dispensations of the '*loi primitive humaine et divine*,' but it is undoubtedly rejected by the '*loi secondaire*,' which pretends only to express the dictates of common sense and the usage of mankind. It is satisfactory to find that M. Ortolan, who has the practical advantage of being a seaman, gives no countenance to his compatriot's preposterous scheme of ascertaining the number of stationary ships to be employed by dividing the length of the coast blockaded by the range of artillery of the vessels, treated as fixed forts.

The other claim to the *notification spéciale*, which, as I have shown, was deliberately rejected in the settlement of 1801, but which is assumed to be an established principle by M. Hautefeuille, is equally inadmissible. Whatever harshness

might in exceptional cases have arisen from the established doctrine as to the effect of the proclamation, coupled with the fact of the blockade, has been tempered by the good sense and moderation with which in particular instances it has been modified in our tribunals, of which Lord Stowell's judgement in the case of the Betsy (1 *Rob. Rep.*, p. 332) is a memorable example. The reasons why the *notification spéciale* never has been, and probably never will be, admitted as a universal condition of blockade, are well stated in the following passage:—

> In the 'Armed Neutrality' of 1800 the clause of the treaties in 1780, above cited, was inserted with the addition that no vessel should incur the penalties of breach of blockade unless she attempted, either by force or fraud, to enter a blockaded port after having been warned by the commander of the blockade regarding the state of the port. If by this clause it were meant (and I do not see what else could be meant) that no notification by one Government to another was to be attended with any issue, and that nothing whatever except a personal warning at the mouth of a port was to have any result, it would be a direct violation of the law of Europe, as most distinctly recognized, and would be a complete encouragement to fraud, and a connivance on the part of neutral Governments at their subjects' interference with the clearest rights of belligerents. It would be lawful under this clause for a whole fleet of neutral merchantmen to sail for a port which their Government had been officially informed was blockaded, and, keeping out of the way of the blockading squadron in such a manner as to avoid communication, to hover about till the accident of a change of wind drove the blockading squadron to a short distance, and then, stealing in, to unload their succours to the besieged, although the latter might have been otherwise obliged to surrender the very next day for want of necessaries; and all this with complete impunity, with strict observance of the law, and under the high-sounding title of a vindication of the rights of neutrals. Very different is the law of nations as declared by Bynkershoek, who says 'that ships hovering near a blockaded port may be confiscated if an intention of steering them into the port can be shown either from the facts of the case or the nature of the cargo.' (Manning's *Commentaries*, p. 324.)

It is observable, that M. Ortolan, while recommending the adoption of the *notification spéciale*, distinctly admits (*Règles Internationales*, vol. ii. p. 305) that it is not an established nor even a generally recognised rule.

Having thus shown what by the Law of Nations is *not* held essential to an 'effective' blockade I will proceed to point out what is the English doctrine on the subject, which I believe to be in complete and accurate accordance with the usage of the civilised world. The chief principles of maritime law, as held

by Great Britain, are stated in five propositions drawn up with great care and precision by Lord Grenville, and recorded in the speech to which I have already referred. They will be found in Hansard's *Parliamentary Debates*, vol. xxxvi. p. 213. The fourth proposition states the law of blockade, and, I believe, is as correct and defensible now as it was sixty years ago. It is in the following words:—

That it is lawful for naval powers when engaged in war to blockade the ports of their enemies by cruising squadrons *bonâ fide* allotted to that service, and duly competent to its execution. That such a blockade is valid and legitimate, although there be no design to attack or reduce by force the port or arsenal to which it is applied, and that the fact of the blockade, with due notice given thereof to neutral powers, shall affect not only vessels actually intercepted in the attempt to enter the blockaded port, but those also which shall be elsewhere met with and shall be found to have been destined to such port, with knowledge of the fact and notice of the blockade.

It is satisfactory to find that M. Ortolan (who, though not always perfectly correct and unprejudiced, is a paragon of accuracy and impartiality compared to M. Hautefeuille) states the general law of blockade in terms which, if a little less full and precise, are substantially and in effect equivalent to the definition of Lord Grenville, and conformable to the decisions of Lord Stowell. The passage is as follows:—

En résumé, le blocus est une opération militaire, résultant des droits de la guerre, qu'un belligérant peut légitimement exécuter sur un lieu quelconque appartenant à son ennemi ou occupé par cet ennemi. Mais, quelque soit le lieu qu'on bloque, il faut que le blocus mérite réellement ce nom, que l'investissement soit effectif—c'est-à-dire, constamment maintenu par des forces navales plus ou moins nombreuses, suivant la nature des lieux, et suffisamment proches pour rendre dangereux l'abord de ces lieux. A ces conditions, le belligérant est en droit de prohiber tout commerce de la part des neutres avec le lieu bloqué; mais pour que cette prohibition entraîne contre ceux qui l'enfreignent une condamnation quelconque, il faut, en outre, que les contrevenants aient acquis d'avance la connaissance de l'existence réelle du blocus, et que la preuve de cette connaissance puisse être démontrée contre eux.' (Ortolan, *Règles Internationales*, vol. ii. p. 323.)

Note.

I am perfectly well aware that writers hostile to this country have laboured to cast upon England the odium of having been

the aggressors in the atrocious policy inaugurated in the Berlin Decree, and which ripened into that outrage upon the Law of Nations which is known by the name of the 'Continental System.' But this imputation has been so often and so completely refuted, that it argues either great ignorance or remarkable want of candour in those who seek at this day to renew it. I should not reopen a question which, in the opinion of all well-informed persons is completely decided, but that M. Hautefeuille relies on it as a proof of his assertion, that England has always practised the doctrine of paper blockade.

M. Hautefeuille, in his chapter on blockade (vol. ii. pp. 251, 252), certainly states the decrees of Berlin and of Milan as being the consequences not only of the Acts of 1806, but also of the Orders in Council of 1807; a statement not very reconcilable with the fact that the Berlin decree of Nov. 1806, preceded and was the avowed cause of the issuing the Orders in Council in 1807. But let us assume that M. Hautefeuille meant what he has not, however, said, that the Berlin decree was a just retaliation for the acts of the British Government in 1806. The papers relating to the English blockade of 1806 will be found in Martens' *Nouveau Recueil* (vol. i. pp. 436—439). The first transaction was the announcement, in a circular letter by Mr. Fox, the Secretary for Foreign Affairs, of the blockade of the rivers Ems, Weser, Elbe, and Trave, of April 8, 1806. The absurdity of the objections, taken in the preamble of the Berlin decree, to this blockade, are pointed out by M. Ortolan (vol. ii. p. 897), who says of this part of the imperial manifesto, '*C'était là adresser à l'Angleterre un reproche inconséquent et commettre en même temps une hérésie en droit international.*' It is idle to pretend that this blockade professed to be, or was, a fictitious or paper blockade. Mr. Fox says that 'all necessary measures have been taken to blockade the mouths of the rivers;' and he proceeds to add, that all 'measures authorised by the law of nations' will be taken against such vessels as violate the blockade. But then, it will be said, the real offence committed by England consisted in the policy announced in the letter of Mr. Fox to the American Minister of the date May 16, 1806, which will be found in the volume of Martens above quoted (p. 436). Now, if this were a new matter, which

had not been fifty times exposed and refuted, there might be more excuse for M. Hautefeuille's misrepresentations. But that matter has been dealt with and disposed of in a most satisfactory manner by writers with whom it is difficult to suppose M. Hautefeuille unacquainted. It is sufficiently well known (though M. Hautefeuille makes no allusion to the fact), that this order of the English Government originated in the conduct of the Prussian Government, who, at the instance of Napoleon, had been induced to seize upon Hanover as an indemnity for the loss of his territories on the Rhine. When Napoleon had thus indemnified the Sovereign he had plundered at the expense of another Government, he annexed to the seizure of Hanover the condition, that all English vessels should be excluded from Prussian ports. This demand was acceded to by the King of Prussia, who issued a proclamation (Martens, *ibid.* ix. p. 435), by which he declared 'the ports of the North Sea, as well as the rivers which flow into it, closed to English shipping.' This was, therefore, properly considered the joint act of France and Prussia. The following account of the matter is taken from Schoell's work, which has been already cited:—

C'est en vain que, pour justifier cette mésure absurde et tyrannique de Buonaparte, les écrivains a ses gages ont voulu la faire regarder comme un acte de représailles contre l'ordre du conseil britannique du 16 mai 1806. Cet ordre, provoqué par l'occupation du pays d'Hanovre par la Prusse, prononça, il est vrai, le blocus contre les côtes, ports et rivières de l'Elbe jusqu'à Brest; mais la seule partie de ces côtes qu'il désigna comme rigoureusement bloquée, était comprise entre Ostende et l'embouchure de la Seine, et renfermoit les ports dans lesquels se firent, pendant plusieurs années, les préparatifs pour une descente dans les îles britanniques. Quant aux ports de l'Allemagne septentrionale et de la Hollande, la déclaration disait que l'entrée et la sortie de ces ports ne seraient point défendues aux vaisseaux neutres, pourvu que ceux qui arrivaient n'eussent été frétés, ni ceux qui sortaient ne fussent destinés pour un des ports de l'ennemi, et que leur cargaison ne consistât ni en propriété de l'ennemi ni en contrebande de guerre. Peu de jours après, le 21 mai, le gouvernement britannique publia un nouvel ordre portant: 'Que S. M. britannique, toujours animée du désir d'éviter, autant que les opérations de la guerre le rendraient possible, tout ce qui pouvait nuire au commerce des états en paix avec l'Angleterre, enjoignoit strictement à tous ses vaisseaux, armateurs, etc. de n'arrêter aucun bâtiment qu'ils rencontreraient dans la mer baltique.' Ainsi les seules victimes de cet état de choses étaient les villes de Hambourg et de Brème. Il faut rémarquer que le gouvernement français ne songea pas à se plaindre de la déclaration du

16 mai, qui fut donnée à l'époque même où une négociation était ouverte entre la France et la Grande-Bretagne: cette déclaration était l'ouvrage de Fox, celui de tous les ministrées qu'on peut le moins soupçonner de projets hostiles contre les neutres. Mais ce qui prouve jusqu'à l'évidence la mauvaise foi ou l'ignorance des défenseurs du système continental, c'est qu'à l'époque où le décret de Berlin fut signé, la déclaration du 16 mai 1806 n'existoit plus. Elle avait été formellement révoquée par une circulaire de 25 septembre 1806 qui annonçait que la navigation entre l'Ems et l'Elbe était aussi libre qu'avant la déclaration du 16 mai. (Schoell, *Traités de Paix*, vol. ix. p. 44.)

It is curious to remark that the acts on which the Berlin Decree professes to be founded were those of the short administration of the Whig party, who afterwards signalised themselves as the chief opponents of the policy of the Order in Council (*Vide* Brougham's *Speeches*, vol. i.). Whatever may be the case as to the justification of the Order of May 21, 1806, the fact that it was revoked by a circular note of Lord Howick's on September 25, 1806, that is to say, two months before the issue of the Berlin Decree, sufficiently disposes of the pretence that the decree was a justifiable retaliation for an act which had been already recalled. This somewhat material circumstance is studiously kept out of sight by M. Hautefeuille, as well as the conduct of the Government of Prussia, in which the order originated. This sort of treatment of such a question may do very well for a party pamphlet, but it is not the way in which the history of the Law of Nations should be written.

The quotation I have given above is from a distinguished Prussian publicist. There will be also found a very accurate account of this transaction in Alison's *History*, vol. viii. p. 122. The documents and facts cited in the note completely justify the author's statement.

These Orders in Council (i. e. of 1806) thus providing only for the blockade of harbours and coasts which it was at the moment highly perilous to enter, or for the *interim detention* of the Prussian cargoes, in retaliation for the unprovoked invasion of Hanover by the Prussian troops, and exclusion of British commerce, in pursuance of the offers of Napoleon already detailed, were clearly within the Law of Nations as admitted by the French Emperor himself, and, in truth, a most moderate exercise of the rights of war. They afford, therefore, no excuse or palliation whatever for the Berlin decree.

And, again—

There can be no doubt that the coasts thus declared in a state of blockade were in the strictest sense subject to such declaration, since the peril of leaving the harbours they contained was such that hardly one of the enemy's armed vessels ventured to incur it.

The answer of Lord Howick, then Foreign Minister, to M. Rist, the Danish Minister, of March 17, 1807 (*Parliamentary Debates*, x. 403), is conclusive to show that the Orders in Council of 1806 neither contemplated nor carried into effect a fictitious or paper blockade. See also the following passages quoted by Alison, vol. viii. p. 138, from the *Parliamentary Debates*:—

The French Government justify, in the preamble of their decree, their proceedings on the ground of the previous proclamation of the late Administration, in April 1806, which declared the coasts of the channel in a state of blockade. *But that is a mistake in point of fact, for in no one single instance did they declare either a harbour, or a coast containing several harbours, in a state of blockade, without having previously invested it.* The coasts of the channel, it is well known, when the blockade was declared, were so closely invested, that not a praam could venture to leave the range of their own batteries without incurring the most imminent risk of capture. The French Government, on the other hand, in their decree, declared this country in a state of blockade, not only without making any attempt to invest it, but without being able to send out a single vessel to endanger neutral vessels which might attempt to violate the blockade. Therein lay the difference — the vital difference—between the proceedings of the two countries: The British Government declared coasts and rivers blockaded when their maritime force was so great, and so stationed, that the enemy themselves evinced their sense of the reality of the investment by never venturing to leave their harbours; the French declared an imaginary blockade on the seas, and acted upon it in their condemnations on land, when they not only had not a single vessel at sea to maintain it, and when their enemies were insulting them daily in their very harbours. Such a proceeding was as absurd as if England, without having a single soldier on the Continent, was to declare Bergen-op-Zoom, or Lille, in a state of blockade, and act upon this order by seizing all goods belonging to citizens of these towns wherever she could find them in neutral bottoms on high seas.

See also the speech of the Advocate-General in 1808 (*Parliamentary Debates*, vol. x. p. 666):—

The preamble of the French decree recites what has been done by this country; but it must be admitted that these imputations are groundless and false. It states that this country had blockaded various ports against neutrals, and argues the necessity of retaliation, and of declaring the British

Isles in a state of blockade. The fact, however, is falsely assumed, that this country ever declared any port in a state of blockade without previously investing that port. I shall do the late Government of this country the justice to say, that when they blockaded any of the enemies' ports, they anxiously inquired whether these ports had been in the first place regularly invested.

Mr. Reddie, in his very careful and impartial work, thus reviews the transaction, when all party passions and international exasperation have long since disappeared:—

Even during this early period of the war, however, Britain has been accused of violating the law of nations, by extending the military operation of blockade from ports or harbours, to the mouths of rivers and whole coasts, by what has been designated a Paper or Cabinet blockade, namely, a notification to neutral foreign powers, that certain ports, rivers, or coasts, from one port to another, will be held as in a state of blockade, although not actually blockaded by an adequate naval force.

Now, according to the law of nations, as administered by Britain in common with other maritime states, there is no such thing, properly speaking, as a Paper or Cabinet blockade; there is no legally effectual blockade, such as to warrant confiscation for a breach of it, unless it be an actual blockade, maintained by an adequate naval force, such as to render it dangerous to approach the place blockaded. In the case of the 'Betsy,' 18th December, 1798,* Sir William Scott thus laid down the law:—'On the question f blockade, three things must be proved—1st, the existence of an actual blockade; 2nd, the knowledge of the party; 3rd, some act of violation, either by going in or coming out with a cargo, laden after the commencement of the blockade.' And this judicial opinion was adhered to and confirmed in a number of subsequent cases, during the French revolutionary war; such as the 'Neptunus,' 18th July, 1799,† the 'Ocean,' 16th May, 1801.‡ Under such a declared state of law, British ships of war, or privateers, could have no inducement to capture any neutral vessel, on the ground of a breach of blockade, unless there was really a blockade *de facto*. Indeed, in the case of the 'Maria Schroeder,' 15th July, 1800,§ when the blockade of Havre had not been strictly maintained, the neutral vessel was ordered to be restored. And such appears to have been the administration of the law of blockade by Britain, from the renewal of the war in 1803, till after the Berlin decree of the French Emperor Napoleon in November 1806. The British orders in Council, during that period, which notified the blockade to neutral powers, gave directions simultaneously for the preparation of the naval force requisite to commence and maintain it. And, so far as regarded individual ports or harbours, there was no extension whatever of the old-established right of blockade.

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* Rob. *Adm. Rep.* i. p. 93.
† *Ib.* ii. p. 110.
‡ *Ib.* iii. p. 297.
§ *Ib.* iii. p. 147.

There still remains the charge against Britain of having, even during the short period of the war we are now contemplating, blockaded not merely ports or harbours and rivers, but also whole coasts. And there can be no doubt that, by the Order in Council of the 16th May, 1806, the British Government directed that the necessary measures should be taken for the blockade of the coasts, rivers, and ports, from the river Elbe to the port of Brest, both inclusive. Still, however, this was nothing but an actual blockade, the Government simultaneously directed the measures necessary for an effectual blockade; and no neutral vessel was confiscated for the breach of anything less than an actual blockade. This was not a paper blockade, or by notification merely, without any adequate force to maintain it, like the subsequent prohibitory Orders in Council of 1807. And there does not appear to be any valid ground in law for holding that the blockade of a coast or of a series of lines of ports, situated near each other, is not an equally legitimate military operation as the blockade of a single port, provided an adequate naval force be brought to bear upon the coast. If the ports be contiguous or near each other, the force directed against each will embrace and include the intervening coast. If the ports be distant from each other, the blockade will be an useless measure, in any point of view: in fact, because neutrals are not likely either to land and deliver, or to ship and load goods on an open coast, without a harbour; in law, as not being actual, or in reality the military operation correctly designated a blockade.

The blockade of 1806 may have been the pretext, it certainly was not an excuse, for the Berlin Decree. I have thought it desirable to go into this matter in some detail, because this charge, as to the blockade of 1806, is really the keystone of the greater part of the continental vituperation of Great Britain.

I hope I have shown conclusively that Great Britain did not in 1806, and never has, except in the exceptional instance of the Orders in Council, as a retaliation upon the Berlin and Milan Decrees, contended for anything like a paper blockade. M. Hautefeuille, with somewhat less inaccuracy but with equal unfairness, refers as examples of paper blockades to the instances of the blockades instituted in 1689 and 1756. But, as M. Hautefeuille might have learnt, from so well known a writer as Vattel, so far from maintaining and justifying the practice, in both instances England acknowledged and made amends for the error. This being the case, and being so stated in all the best known writers on the subject, the reader may judge of the good faith of M. Hautefeuille, when he repeats the assertion, that England has always maintained the doctrine of fictitious blockades.

It may be worth while, on so important a subject, to show in a little more detail what has been and is the precise doctrine and practice of England on this subject—a doctrine and practice which has been already shown to be entirely confirmed by the American Courts. The following account of the principles established in the English Court of Admiralty, is extracted from Mr. Chitty's *Practical Treatise on the Law of Nations*, a work which, though of no great scope, gives a very accurate *précis* of the English decisions:—

It has been well observed that amongst the rights of belligerents, there is none more clear and incontrovertible, or more just and necessary as to its application, than that which gives rise to the law of blockade, as it has been ascertained, defined, and administered by the maritime tribunals of this country. The greater the research that shall be made into the principles of natural law, the more the details of the diplomatic and conventional history of Europe shall be studied, the more will it appear that this right has its origin in the purest sources of maritime jurisprudence, that it is sanctioned by the practice of the best times, and, above all, that it is so essentially connected with the vital interests of Great Britain, that the renunciation of it, under any circumstances, must be regarded as the renunciation of one of the firmest charters of our naval pre-eminence, and as the surrender of one of the surest bulwarks of our national independence. Clear, however, and indisputable as this right is—just and necessary as is the exercise of it—it cannot be denied but that it is one of the most severe and harsh in its operation of any law that is inscribed in the whole code of public law. It is under this impression that tribunals of the law of nations, before they have enforced the provisions of a blockade, have uniformly required it to be established by clear and unequivocal evidence, first, that the party proceeded against has had due notice of the existence of the blockade, and, secondly, that the squadron allotted for the purposes of its execution was fully competent to cut off all communications with the interdicted port. These points have been deemed so indispensably required to the existence of a legal blockade, that the failure of either of them has been held to amount to an entire defeasance of the measure, and this even in cases where the notification of it has issued immediately from the fountain of supreme authority.

'On the question of blockade,' said Sir William Scott, in the case of the 'Betsy,' 'three things must be proved: 1st, the existence of an actual blockade; 2ndly, the knowledge of the party; and 3rdly, some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade.'

The blockade must not only have been declared by competent authority, but must be also an actually existing blockade. A blockade is then only to be considered as actually existing, when there is a power to enforce it. 'The very notion of a complete blockade,' said Sir William Scott, in the

case of the 'Stert,' 'includes that the besieging force can apply its power to every point of the blockaded state. If it cannot, there is no blockade of that part where its power cannot be brought to bear.' We find, however, from the case of the 'Frederick Molke,' that 'it is not an accidental absence of the blockading force, nor the circumstance of being blown off by the wind (if the suspension and the reason of the suspension are known), that will be sufficient in law to remove a blockade.' But if the relaxation happen not by such accidents as these, but by the mere remissness of the cruisers stationed to maintain the blockade (who are too apt, by permitting the passage of some vessels, to give fair ground to others for supposing the blockade concluded), then it is impossible for a court of justice to say that the blockade is actually existing. 'It is in vain,' said Sir William Scott, in the case of the 'Juffrow Maria Schroeder,' 'for Governments to impose blockades, if those employed on that service will not enforce them. The inconvenience is very great, and spreads far beyond the individual case. Reports are eagerly circulated that the blockade is raised; foreigners take advantage of this information; the property of innocent persons is ensnared, and the honour of our country is involved in the mistake.'

The second point to be examined is the knowledge which the neutral may have respecting the blockade of any particular port: since, in order to affect him with the penal consequences of a violation, it is absolutely necessary for him to have been sufficiently informed of the blockade itself. This sufficient information may be communicated to him in two ways: by a formal notification from the blockading power, or by the notoriety of the fact. 'To make a notification effectual and valid,' said Sir William Scott, in the case of the 'Rolla,' 'all that is necessary is, that it shall be communicated in a credible manner; because, though one mode may be more formal than another, yet any communication which brings it to the knowledge of the party, in a way which could leave no doubt in his mind as to the authenticity of the information, would be that which ought to govern his conduct, and will be binding upon him. It is at all times more convenient that the blockade should be declared in a public and distinct manner, instead of being left to creep out from the consequences produced by it.'

The effect of a notification to a foreign Government is to include all the individuals of that nation. 'It would be the most nugatory thing in the world,' said Sir William Scott, in the case of the 'Neptunus,' 'if individuals were allowed to plead their ignorance of it. It is the duty of foreign Governments to communicate the information to their subjects, whose interests they are bound to protect: I shall hold, therefore, that a neutral master can never be heard to aver, against a notification of a blockade, that he is ignorant of it.'

When once the notice, actively or constructively, has reached the neutral, he is not permitted to go to the station of the blockading force upon pretence of inquiring whether the blockade have terminated. 'The merchant,' said Sir William Scott, in the case of the 'Spes' and 'Irene', 'is not to send his vessel to the mouth of the river, and say, 'If you don't meet with the blockading force, enter; if you do, ask a warning, and proceed

elsewhere.' Who does not at once perceive the frauds to which such a rule would be introductory? The true rule is, that after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of inquiry.'

In adventures from America, indeed, the Court allowed some relaxation of this rule, on account of the distance of that country. This relaxation, as explained in the last-mentioned case, was, 'that ships sailing from America should be entitled to a notice, even at the blockaded port, and that ships sailing afterwards might sail on a contingent destination even for that port, with the purpose of calling at some British port, or at some neutral port, for information; and that they should be allowed the benefit of such a contingent destination, to be ascertained and rendered definite by the information which they should receive in Europe. But in no case was it held that they might sail to the mouth of a blockaded port to inquire whether a blockade, of which they had received previous formal notice, was still in existence or not. If particular parties are innocent in their intention, it is still a measure of necessary caution and of preventive legal policy to hold the rule general, against the liberty of inquiring at the very mouth of the blockaded port; which would amount, in practice, to a universal licence to attempt to enter, and, on being prevented, to claim the liberty of going elsewhere.'

The indulgence, thus limited, was considered as due in reason to the American merchants. 'For,' observed Sir William Scott, in the case of the 'Betsy,' 'lying at such a distance, where they cannot have constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that they should send their ships conjecturally, upon the expectation of finding the blockade broken up after it had existed for a considerable time. A very great disadvantage indeed would be imposed upon them, if they were bound rigidly by the rule which justly obtains in Europe, that the blockade must be conceived to exist till the revocation of it is actually notified. For if this rule is rigidly applied, the effect of the blockade would last two months longer upon them than on the trading nations of Europe, by whom intelligence is received almost as soon as it is issued.'

The notification of blockade must be legal and regular. During a blockade, which extended only to Amsterdam, an English commander gave a notice to a neutral entering Amsterdam of blockade upon all Dutch ports. The notice was held to be invalid, 1st, with reference to the other ports, because, as we have seen, a commander of a King's ship has no right to enlarge a blockade; and 2ndly, with reference to Amsterdam itself, 'because,' said Sir William Scott, 'it took from the neutral all power of election as to what part of Holland he should enter, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral master to this kind of distress; and I am of opinion, that if the neutral had contravened the notice, he would not have been subject to the condemnation.'

The principles laid down in these decisions show the equity of

the spirit in which the law was administered by Lord Stowell, and which is so highly and justly commended by Kent. I need hardly add, that M. Hautefeuille's pretensions to reject what he calls the practice of '*prévention et suite*' is as wholly unsustainable as the rest of his doctrine on this subject.

TWO LETTERS

ON

NEUTRAL TRADE IN CONTRABAND OF WAR.

I.

NEUTRAL TRADE IN CONTRABAND OF WAR.

THE recent unfortunate evasion of the 'Alabama' has given rise to much discussion on the general duty of a neutral Government with respect to the trade of its own subjects with the belligerents in contraband of war. One might have supposed that if there were any question which the authority of accredited writers, the definitions of public documents, and the universal practice of nations, had clearly and decisively ascertained, it was this very question on which, unhappily, there seems to prevail a most general and unfortunate misapprehension. This misapprehension, grave as it is in the exasperation which it is calculated to produce between friendly nations, is not altogether inexplicable. We have the misfortune to live in days when, in the name of liberalism, philanthropy, and civilisation, we are invited to upset the whole fabric of international law which the reason of jurists has designed and the usage of nations has built up, and to rear upon its ruins the trumpery edifice of a shallow caprice. It is the old story of that pretentious philosophy which, by a recurrence to first principles, attempted with so little success to operate the regeneration of mankind. I would that we had yet among us the multitudinous eloquence of Burke or the poignant wit of Canning to do condign justice upon this presumptuous sciolism.

I think that among the numerous candidates for distinction in this rivalry of innovation, precedence should be duly awarded to M. Hautefeuille. For contempt of the existing code of international law, for intrepidity in the misrepresentation of history, for audacity of paradox, this ingenious speculator is without his equal, even in the modern license of

coxcombical jurisprudence. I can concede to M. Hautefeuille everything except the title to originality. The leading principle on which his well-known work is constructed has been, in fact, anticipated by M. Genet, the celebrated plenipotentiary of the French Republic, in a dispatch to Jefferson in 1793. 'I do not recollect,' says this enlightened French jurist, 'what the worm-eaten writings of Grotius, Puffendorf, and Vattel say on the subject. I thank God I have forgotten what these mercenary jurisprudists have written on the rights of nations at a period when they were all enchained. The rights of man are enclosed in my breast with the source of life.' I venture to suggest to M. Hautefeuille that he should adopt this paragraph as the motto to his next edition. Anyone who is acquainted with the system of M. Hautefeuille will at once recognise in these lofty sentiments the germ of the theory by which that author evolves the whole doctrine of international law from his own moral consciousness, and overrules all established principles by a 'primary divine law,' which seems to have been specially revealed to this inspired Gallican lawgiver, much as the 'Book of Mormon' was intrusted by Providence to the exposition of Joseph Smith.

Now, I observe that persons imperfectly acquainted with these subjects are in the habit of referring, upon questions which from time to time emerge, to the writings of M. Hautefeuille. His work on neutral rights is seductive from the false air of precision which it affects; it is apparently copious, and might be expected to be a safe guide, but I have no hesitation in saying that, of all treatises on this subject which have ever come under my notice, it is the most inaccurate and the most unreliable that is anywhere extant. I think I am not putting the case too high when I say that on any given point the presumption is that the propositions which will be found to be laid down by M. Hautefeuille are not only not the law, but are the exact reverse of the established law of nations.

This may seem a strong statement; but I will proceed at once to justify it. I showed in some letters addressed to you last spring, how entirely untrustworthy were the statements and doctrines of M. Hautefeuille on the subject of blockade.

I think I shall be able to satisfy you, that, on the topic of contraband, his authority is even less to be relied on. It is notorious that, at the present moment, there is great irritation in the American mind at the trade carried on in this country by English merchants with the several belligerents in various munitions of war. It is certainly a matter of the first importance to the friendly relations of England and America, to ascertain whether and how far such a trade is or is not lawful—whether, in short, it is a trade which the neutral government is bound to prohibit and prevent, and which, if not so prohibited and prevented, furnishes a just ground of complaint on the part of the belligerent against the neutral Government. Now, if a Northern politician, exasperated at a purchase of arms or of gunpowder effected at Liverpool by the Confederate Government, were to consult the pages of M. Hautefeuille, he would find it laid down, under the head of 'Contraband' (vol. ii. 162 of the last edition), in the plainest and most positive terms, that a trade in contraband carried on by a neutral subject with one of the belligerents in the neutral territory, is unlawful and prohibited; and that the injured belligerent has a right to resent by war the conduct of the neutral Government, if it should fail to prohibit and prevent such a trade on the part of its subjects,—a doctrine certainly, if it be sound, most momentous in its consequences, and devolving upon neutral Governments a most intolerable responsibility. If M. Hautefeuille be right, the English Government is answerable to each belligerent for every contract which has been made since the beginning of the war by an English merchant in Liverpool, for the sale of munitions of war to the other belligerent; and, if this be so, certainly both the Northern and Southern States have an ample and ready-made *casus belli* against Great Britain. If the people of New York read and believe M. Hautefeuille, it is not surprising that they should be exasperated to the last degree against the English Government, which, it cannot be denied, has failed in fulfilling what they are taught to believe is an international obligation. But I venture to affirm, that the doctrine thus laid down by M. Hautefeuille is not only not the law of nations, but that it is the exact contrary of the principles which all the authorities

have established, and which the universal practice of nations has confirmed. I unhesitatingly assert, in contradiction to M. Hautefeuille, that the trade in contraband with either belligerent by private persons of the neutral State, within the neutral territory, is a lawful trade; that it is not the duty of a neutral Government to prohibit such a trade within its own territory; and that the belligerent State can have no ground of complaint against the neutral Government in respect of such a trade. That it is the transportation to the belligerent territory, and not the sale in the neutral territory, of contraband, which constitutes an offence against the belligerent; and that, even for this offence, the belligerent can have no recourse against the neutral Government, which is in nowise bound to interpose, but must rely for his remedy on the capture of the contraband *in transitu*. It is a discreditable thing to the state of international science that it should be necessary, at the present time, to cite authority in support of propositions so elementary, and which ought to be beyond the possibility of dispute.

The law on this point is very satisfactorily and clearly explained by M. Ortolan, a French naval officer and writer on international law, who, though a far less pretentious, is a much more trustworthy author than M. Hautefeuille. M. Ortolan has the advantage of knowing what the law of nations is, and possesses, in addition, the fairness and the modesty which enable him to state it correctly. This is what he says on the subject of contraband trade:—

Dès que l'existence d'une guerre a séparé divers états, d'un côté en belligérants et de l'autre en neutres, il est un commerce qui devient illicite pour ces derniers non plus seulement en vertu des lois particulières d'un seul état, mais en vertu des lois internationales, reconnues par tous. C'est celui qui consiste dans *le transport chez l'ennemi* des marchandises ayant un rapport direct aux opérations militaires.

Si c'est l'état neutre lui-même qui fait opérer ce transport, soit qu'il le fasse gratuitement, soit qu'il en reçoive le prix, il devient donc auxiliaire de la lutte, et par conséquent il rompt la neutralité. *La chose change si ce sont les sujets de cet état qui, sans appui de leur Gouvernement, font de ce même transport un objet de leurs opérations commerciales. Une Puissance qui reste neutre n'est pas obligée de défendre ce commerce à ses sujets, encore moins de les punir pour l'avoir fait; seulement elle ne peut le couvrir de sa protection.*

'Quand j'ai notifié aux Puissances neutres ma déclaration de guerre à tel ou tel peuple,' dit Vattel, 'si elles veulent s'exposer à lui porter des

choses qui servent à la guerre, elles n'auront pas sujet de se plaindre au cas que leurs marchandises tombent dans mes mains, *de même que je ne leur déclare pas la guerre pour avoir tenté de les porter.* Elles souffrent, il est vrai, d'une guerre à laquelle elles n'ont point de part: mais c'est par accident. Je ne m'oppose point à leur droit; j'use seulement du mien; et si nos droits se croisent et se nuisent réciproquement, c'est par l'effet d'une nécessité inévitable. Ce conflit arrive toujours dans la guerre.'

'Nous avons insisté à dessein sur ces mots *commerce de transport* des marchandises propres aux besoins immédiates de la guerre, parcequ'en effet *c'est le seul qui soit illicite. Un état neutre qui laisse ses sujets se livrer à un commerce passif de ces mêmes objets—c'est-à-dire, qui permet à tous les belligérants indistinctement de venir les acheter sur son territoire pour les transporter ensuite, à leurs frais et à leurs risques, sur leurs propres navires—n'enfreint pas la neutralité.*' (Ortolan, *Règles Internationales,* vol. ii. pp. 156–159.)

The same doctrine had been long before laid down, with his usual clearness and precision, by Bynkershoeck, whose well-known belligerent sympathies make his testimony to neutral rights all the more authoritative:—

Idque in instrumentis bellicis comparandis vulgo servamus, ut enim ea ad utrumque amicum non recte vehamus, sine fraude tamen vendimus utrique amico, quamvis invicem hosti, et quamvis sciamus alterum contra alterum his in bello esse usurum.—Q. J. P., li., cap. 22.

It will be observed that Bynkershoeck not only states the law, but bears witness to the universal practice of nations—'vulgo servamus.' Your readers will probably be disposed to ask where M. Hautefeuille picked up this newfangled monstrosity which he produces with such positiveness and authority. According to his own account, he has borrowed it from a mighty foolish work of a certain Abbate Galiani, Sicilian Secretary of Legation at Paris, published in the interest of the Armed Neutrality in 1782, which proposes to conduct war on principles which Mr. Carlyle has described by the designation of 'rose-pink philanthropy.' This author's own account of his work is somewhat comical. He says he wrote it 'in a short time and with no books,' an excuse which may palliate his inaccuracies, but which certainly does not reinforce his authority. He adds, with great *naïveté,* 'Un irresistibile comando ha prodotto quest' opera.' Mr. Reddie, in his valuable *Researches, Historical and Critical, in Maritime International Law,*' makes the following remark on this author:—'He seems to have embarked almost without a compass on the wide sea of general principle, and

inquires rather what maritime international law ought to be, than what it had been or was at the time he wrote.' After such a description it is easy to understand why M. Hautefeuille follows in the wake of Galiani. Indeed, it would be hard to say whether Galiani is an earlier Hautefeuille, or Hautefeuille a later Galiani. This work of the Abbate received the honour of a refutation in the celebrated and invaluable treatise of Lampredi; a writer who, in point of ability, learning, and logic, is worth a thousand Galianis and Hautefeuilles. Mr. Wheaton is almost angry with Lampredi for condescending to notice the idle crotchet of Galiani which M. Hautefeuille has adopted and reproduced. He says:—

> Lampredi then proceeds to consider an *idle question* raised by Galiani, 'whether the conventional law of nations interdicting the trade with the enemy in articles contraband of war extends to the sale of the same articles within the neutral territory.' Galiani pretends that it does, and that a ship, for example, built and armed for war in a neutral port, cannot be there lawfully sold to a belligerent. *Lampredi takes a great deal of superfluous pains* to fortify, both by reason and an appeal to the authority of treaties and of preceding public jurists, his own opinion that the *transportation* to the enemy of contraband articles alone is prohibited, but that the sale of such articles within the territory of the neutral country is perfectly lawful. (Wheaton, *History of International Law*, p. 312.)

Mr. Wheaton, when he was penning this paragraph, probably little dreamt that at the very time a writer, pretending to authority, was reproducing in France as the true law of nations a doctrine which the American jurist thought too contemptible for discussion.

It may be worth while to quote what is said on the subject by Azuni—a writer, it is true, not of any great authority or learning, but one whose bitter and frantic animosity against Great Britain might perhaps secure for him the confidence of M. Hautefeuille. The following passages will be found in the *Droit Maritime de l'Europe*, a work published in 1805 by the judge at Nice, with an evident eye to flatter and please the Imperial régime. Whatever may be the other demerits of Azuni's work, his doctrine on this point is unquestionably sound, and the reasons which he adduces are unimpeachably accurate.

> Commerce in all kinds of merchandise, commodities, and articles of manufacture, being allowed in time of peace to the subjects of a nation, so

far as the laws of the state, or particular treaties with other powers create no exception, they ought to be permitted to do the same thing during the continuance of war, since neither of the belligerent parties has a right to impose any new obligations on the neutral, which did not exist in time of peace.

The universal law of nations, founded on that of nature, in authorising nations to carry on commerce, has made no distinction as to goods which might be the object of trade in time of peace and not in time of war. By this law, therefore, there can be no goods, commodities, or manufactured articles, which may not be sold or carried to the belligerents. Neutrals cannot be denied the privilege of letting to the powers at war their men, their ships, and every means of transportation, pursuant to their former practice, provided that when they shall be requested to furnish things which they are in a situation to procure, they do not refuse to one what they grant to another.

It is necessary, therefore, to lay it down, as a fundamental maxim of every code, that as neutral nations may lawfully continue the commerce carried on by them in time of peace, no distinction ought to be made of the goods, commodities, or manufactures, though adapted for war; and, for this reason, the sale and transportation of them to the coasts of the belligerent countries is allowed, according as their commerce may be active or passive in time of peace, without it being considered in any manner as a violation of neutrality, provided it be done without any hostile design, and without a marked preference and partiality.

If, by the universal law of nations, neutrals who are in possession of an active commerce with the belligerents, may impartially carry to one of them every kind of merchandise, even contraband of war, by the same principle of reason, the sale on their own territory ought to be permitted, if there existed before the war a passive commerce with the belligerents. Thus, all passive commerce, or an impartial sale on its own territory, of merchandise and manufactured articles of every kind, is always allowed to a neutral nation, whenever its sovereign has made no treaty to the contrary with any of the belligerents whose subjects come to purchase or provide themselves with such articles, in the neutral territory, and when he does not interfere with the purchases, sales, and other contracts for the transfer of property. As long as he does not fill his magazines with warlike stores, nor send vessels to transport them to the territories of the belligerents; as long as he confines himself to protecting the general commerce of his dominions, and securing its subjects, in the same manner, and with the same freedom, as before the war, he merely exercises the undeniable rights which belong to him, and which can be restrained only by conventions, express or implied.

Notwithstanding the certainty of this fundamental principle, Galiani, who has been so often cited, is desirous of establishing a theory, directly opposite, forgetting, that he thereby contradicted himself on every other point.

After having justly remarked, page 111, that neutrality is not a change, but a continuation of a former state, and at page 142, 'that the state of neutrality is not, nor can be, a new state, but a continuation of a former one,

by the sovereign that has no wish to change it,' he concludes, to the astonishment of every man of good sense, that neutrals cannot sell to belligerents, on their own territory, arms, instruments, and other warlike stores, as they might have done before the war. But if war, as he has said, produce no change in a neutral nation; if it do not destroy the rights it possessed in time of peace, for what reason, I ask M. Galiani, ought it to abstain from continuing its commerce? Why should it be obliged to change its state, when, according to his own principles, it ought to experience no alteration in consequence of neutrality? Why, in short, may it not offer for sale, in one of its ports, a vessel fit for navigation, and armed for war? In his work I discover no cause for all this contradiction, except the confusion which prevails in it, and the error into which he has been led, by the spirit of party and a desire to refute Lampredi, who maintains a contrary opinion. This is the cause why he has obscured the truth by so many artful sophisms and ingenious paralogisms. It is therefore necessary to repeat, in this place, the incontrovertible principle by which neutrals, in virtue of the conventional law of Europe, are forbidden to carry to belligerents things adapted to warlike purposes, and by which they are allowed, according to the universal law of nations, to sell them as merchandise, within their own territory, to any person who offers to purchase them; provided this be done with impartiality, and without favouring one belligerent party more than another.

Lampredi has so successfully criticised this answer, that it would be useless, in this place, to point out the confusion in the reasoning of Galiani, and the error into which he has fallen in his theory concerning the prohibition of the sale of contraband goods within the neutral territory—a theory which he supports by a coarse argument, drawn from the sale of wine and oil, usually carried on in the shops and taverns of the city of Naples.

The error of Galiani is thus evident. In the public treaties down to the present time, do we in fact see any prohibition than that of the transportation of contraband goods to an enemy? No nation, not even the most powerful, or those who could, with impunity, exercise the right of the strongest, have ventured, in their declarations of war, dictated by the most violent animosity, to prohibit neutrals from the impartial sale of any goods in their own territory. They have confined themselves to the threat of confiscating contraband articles which should be found clearly destined to the enemy.

It has sometimes happened that a nation, either from motives of political prudence, or from fear of offending one of the belligerent parties, whose insults it was not in a situation to repel, has consented to sacrifice its incontestible rights of commerce, by prohibiting, wholly or partially, the sale of warlike stores within its territory; but the example of a few feeble and unarmed nations whom necessity compels to yield, and to prefer the temporary sacrifice of their commerce to a greater evil, proves nothing against the invariable and universal practice of Europe, continued for so many centuries. Galiani might have perceived as much, in spite of the restless jealousy which, amidst his various meditations on this subject, impelled him to contradict the opinion of Lampredi.

It is not surprising, therefore, that having taken to himself, as he does throughout his work, such a blind guide as Galiani, M. Hautefeuille should find himself so often at the bottom of the ditch.

Permit me, while I am warning your readers against false lights, to refer them to a guide who will never lead them astray —to the greatest jurist whom this age has produced—I mean the American Chancellor Kent. Of his writings it may safely be said that they are never wrong. The exposition of international law contained in the first volume of the *Commentaries* has but one fault—that of being too short:—

> It is a general understanding, grounded on true principles, that the Powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral Sovereign himself. It was contended on the part of the French nation, in 1796, that neutral Governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent Powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry themselves to the belligerent Powers, contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile Power to seize, are conflicting rights, and neither party can charge the other with a criminal act. (*Commentaries*, vol. i. p. 142.)

It will be observed from this passage, that the law on this point does not rest solely on the authority of arbitrary text-books, or on uncertain usage. It has been the subject of a solemn decision of the Supreme Court of the United States, in its best days, in the celebrated case of the Santissima Trinidad. The following passage is from the unanimous judgement of that great tribunal in 1822, delivered by Chief Justice Story,—a more authentic and conclusive authority it would be impossible to adduce:—

> There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation. ('The Santissima Trindad,' 7 Wheaton *Reports*, 340.)

The same doctrine is copiously expounded in a very learned

judgement of the Supreme Court of Massachusetts (6 *Mass. Rep.*, 113), which I commend to the careful study of Mr. Seward and Mr. Adams.

I think, I have now fulfilled my pledge. I have shown, upon authority which cannot be controverted, what the firmly established and indisputable Law of Nations really is, and that it is exactly the reverse of the doctrine laid down by M. Hautefeuille. What possessed the French champion of neutral privileges to adopt the bantling of the Abbate Galiani, which involves consequences so injurious to neutral trade, I am at a loss to conceive; unless it be on some theory of retributive injustice, by which M. Hautefeuille, having throughout half his book asserted the claims of neutral powers to rights which the Law of Nations has universally denied them, thinks himself bound, on the principle of compensation, to impose upon them obligations to which that law has never yet subjected them.

I wish, Sir, I could stop here; but the public mischief of such an error as this makes it necessary to call your attention to another writer, of whom, personally, I desire to speak with the greatest respect. The recent work of Dr. Phillimore is a useful compilation, in which, however, amidst the heterogeneous pile of indiscriminate and undigested material, in which the good, bad, and indifferent is garnered up with laborious impartiality, an inexperienced reader is not unlikely to lose his way. It is a digest of opinions and authorities, rather than a scientific disquisition, on the topics to which they refer. When I turned over the pages of Dr. Phillimore's book, I confess it was with the confident expectation of finding the unauthorized crotchet of M. Hautefeuille either scouted with the brief contempt of which Wheaton thought it worthy, or, at least, disposed of upon the clear authorities to some of which I have referred you. But what was my astonishment—I will add my regret—to find that, so far from condemning this monstrosity, Dr. Phillimore actually approves and adopts it! That in the composition of his work the author should have preferred, on such a point, the unauthorised speculations of Galiani and Hautefeuille to the unanimous sentence of Bynkershoek, Vattel, Lampredi, Azuni, Wheaton, Kent, Ortolan, Story, Martens, Klüber, and, finally, that of the Supreme Court of the United States, is to

my mind, I confess, wholly incomprehensible. Dr. Phillimore, in a note to his remarks on this subject, says, 'Galiani refutes Lampredi.' No one who is acquainted with the merits of these two authors will be able to read such an observation without a smile; it is much as though, in an account of the controversy on the authenticity of the letters of Phalaris, a writer now-a-days should remark, 'Boyle refuted Bentley on this subject.'

The only argument adduced by Dr. Phillimore against the well-established rule which Kent states to be 'grounded on true principles,' is an appeal to the 'eternal principles of justice'—a sort of reasoning which in the courts of law is the well-known resort of an advocate who feels that the facts and the law are dead against him, and who is about to invite the court to overrule an Act of Parliament. I can only express my confident hope that, in advising the Crown, the Queen's advocate will have regard rather to the law and practice of nations than to the 'principles of eternal justice,' which it should seem on this subject are hardly compatible with reason and common sense.

If the doctrine, the falsity of which I have endeavoured to expose, had any colour of foundation, it would clearly be the duty of Her Majesty's Government to issue a new edition of the Proclamation of Neutrality which they put forth on May 14, 1861. This solemn and authoritative document, founded on long-established precedents, accurately expressed the views of the English Government of the obligations of neutral States towards belligerent Powers. If the doctrine of M. Hautefeuille and Dr. Phillimore is correct, the Queen's proclamation is a most mischievous fraud on Her Majesty's subjects. Let us see what the proclamation forbids and what, by not forbidding, it permits. It commences by reciting the Foreign Enlistment Act, and warns all Her Majesty's subjects that if they offend by doing any of the acts therein prohibited—

Or by breaking, or endeavouring to break, any blockade lawfully and actually established by or on behalf of either of the said contending parties, or by *carrying* officers, soldiers, despatches, *arms, military stores, or materials, or any articles considered and deemed to be contraband of war, according to the*

law or modern usage of nations for the use or service of either of the said contracting parties, all parties so offending will incur and be liable to the several penalties and penal consequences by the said statute, or by the law of nations in that behalf imposed or denounced. And we do hereby declare that all our subjects and persons entitled to our protection who may misconduct themselves in the premises will do so at their peril, and of their own wrong, and that they will in no wise obtain any protection from us against any liabilities or penal consequences, but will, on the contrary, incur our high displeasure by such conduct.

The men who drew up this document knew what the Law of Nations was. Who does not see at a glance that the doctrine of the duty of neutrals and the responsibility of neutral Governments is precisely that which is laid down in the authorities to which I have referred? What Her Majesty's subjects are warned against is the *carrying* of the contraband to the belligerent, not the *trade* in contraband within their own territory. It is precisely the definition of Bynkershoek, '*non recte vehamus, sine fraude vendimus.*' It is the *transportation* and not the *traffic* which is unlawful. The nature of the penalty is pointed out with equal clearness and correctness—viz., the withdrawal of the Queen's protection from the contraband on its road to the enemy, and an abandonment of the subject to the operation of belligerent rights. The true doctrine is enforced with singular clearness and force by President Pierce, in his Message of December 1854:—

The laws of the United States do not forbid their citizens to sell to either of the belligerent Powers articles contraband of war, or to take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the Government. Thus, during the progress of the present war in Europe, our citizens have, without national responsibility, therefore, sold gunpowder and arms to all buyers, regardless of the destination of those articles. Our merchantmen have been, and still continue to be, largely employed by Great Britain and France, in transporting troops, provisions, and munitions of war, to the principal seat of military operations, and in bringing home the sick and wounded soldiers; but such use of our mercantile marine is not interdicted, either by the international or by our municipal law, and, therefore, does not compromise our neutral relations with Russia.

This was no new doctrine in America. In the days when the fortunes of the United States were under the guidance of

far greater men than President Pierce, or his successors, Washington and Jefferson, in their wise precautions to preserve the neutrality of their Government from the infection of the European contest in 1793, published instructions for the guidance of the Commissioners of Customs, from which the following passage is an extract:—

> The purchasing within and exporting from the United States *by way of merchandise* (italics in original) articles commonly called contraband, being generally warlike instruments and military stores, is free to all the parties at war, and is not to be interfered with. If our own citizens undertake to carry them to any of those parties, they will be abandoned to the penalties which the laws of war authorise. (*American State Papers*, vol. i.)

In 1796 the American Secretary of State wrote:—

> Our citizens have always been free to make, vend, and export, arms: it is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be *hard in principle, and impossible in practice*. (*American State Papers*, Jan. 20, 1796.)

So far as to the American practice. Let us hear the voice of English statesmanship on the same point. Mr. Huskisson, in the debate on the Terceira affair in 1830, cites the opinion of Mr. Canning to the following effect (*Hansard*, vol. xxiv., N.S., p. 209):—

> 'Arms may leave this country as a matter of merchandise, and however strong the general inconvenience, the law cannot interfere to stop them. It is only when the elements of armaments are combined that they come within the provision of the law, and if that combination does not take place till they have left this country, we have no right to interfere with them.' These are the words of Mr. Canning, who extended the doctrine to steam-vessels and yachts that might afterwards be converted into vessels of war, and they appeared quite consistent with the law of nations. At the very moment he was speaking, arms and clothing were about to be sent out of this country to belligerents. Were they to be stopped, or were they to be followed and brought back? He believed the answer would be, No; and if it were Yes, of what use, he would ask, would be our skill in building ships, manufacturing arms, and preparing instruments of war, if equally to sell them to all belligerents were a breach of neutrality?

And yet in the face of such authorities as these, Dr. Phillimore (vol. iii. p. 324) puts it as a preposterous and an intolerable supposition that Belgium should be permitted to sell arms and ammunition to Russia during the Crimean war without being guilty of an infraction of neutrality!

These documents at all events prove that whatever converts M. Hautefeuille and Dr. Phillimore may have made in other quarters, neither the Government of Great Britain nor that of the United States is to be reckoned as a seceder from the institutes of international law, or a recruit to the 'principles of eternal justice.'

If the doctrine against which I am contending were to be established, and the duty of neutral Governments to prohibit the domestic trade in contraband by their subjects were once to be admitted, it is easy to perceive the monstrous and intolerable consequences that would ensue. Instantly upon the declaration of war between two belligerents, not only the traffic by sea of all the rest of the neutral Powers of the world would be exposed to the inconveniences of which they are already impatient, but the whole inland trade of every nation of the earth, which has hitherto been free, would be cast into the fetters. The neutral Government, being on this assumption held responsible to the belligerent for the trade of its subjects within its own territory, must establish in every counting-house a sort of belligerent excise. It must have an official spy behind every counter, in order that no contract may be concluded for which either belligerent may call it to account, and in respect of which it may possibly find itself involved in war. This newfangled and, forsooth, liberal doctrine would introduce the irksome claims of belligerent rights into the bosom of neutral soil, from which they have been hitherto absolutely excluded, and in which they ought to have nothing to do. It would give to the belligerent State a right of interference in every act of neutral domestic commerce, till at last the burden would be so enormous that neutrality itself would become more intolerable than war, and the result of this assumed reform, professing to be founded on 'the principles of eternal justice,' would be nothing less than universal and interminable hostilities.

It will have been remarked that I have kept this discussion closely confined to the general principles of the Law of Nations. How far the question is affected by the Foreign Enlistment Act is a point which I have intentionally left on one side. Whether that domestic statute in any respect operates upon the rights of foreign States, or gives them a title to reclamation, is a question

of considerable importance and some nicety. This is a very interesting and not a very simple enquiry, from which I must at present abstain. I mention it now only to show that I have not overlooked it, and also in order to observe that, whatever view may be taken of this point, it in no way affects or invalidates the reasonings on which I have relied. The provisions of the Foreign Enlistment Act, as I may perhaps take another opportunity of demonstrating, have their origin in a wholly distinct principle.

The vital importance of this matter to the great issues of peace and war must be my excuse for the length at which I have taxed your indulgence. It is by the recognition of and obedience to fixed principles of right that the society of nations is alone enabled to escape an incessant appeal to the last arbitrament of the sword. *Misera est servitus ubi jus incertum.* No wrong more serious or more indefensible can be wrought to the commonwealth of mankind than that which is committed by rash and inconsiderate writers who presume of their own caprice to discredit, to pervert, and to undermine the settled principles of public law. Like wreckers they hang out deceptive beacons which lure the vessel of the State upon the rocks. The evils of such false teaching are immediate and most disastrous. Belligerents, already sufficiently exasperated, are mischievously instructed to consider themselves the victims of imaginary wrongs, arising out of the supposed violations of unreal rights. It is of the last importance to eradicate from the public mind on both sides of the Atlantic these pernicious errors, on whatever authority they may be promulgated. The interests of peace demand that there should be no doubt upon this question. It is no part of the duty of a Government to prohibit or prevent the trade of its subjects in contraband of war; and the belligerent Government has no right to consider itself aggrieved by the non-performance of an obligation to which the neutral State is not subject. The traffic in contraband of war within the neutral territory is absolutely lawful. If the neutral subject engages in the transport of contraband he in no degree compromises the responsibility of his own Government; and the belligerent must be content with his remedy by capture, and he is entitled to look for no other. When the neutral Sovereign

has withdrawn from his subjects engaged in such a trade the protection of his flag, he has discharged the whole duty of neutrality. The statement of M. Hautefeuille that such a trade affords to the belligerent a lawful ground of war against the neutral Government is a monstrous and mischievous solecism. If the reassertion of these principles, founded in reason, settled by law, consolidated by experience, accepted by the unanimous accord of nations, tends in any degree to remove that irritation which is the unhappy fruit of ignorance inflamed by passion, the object of this letter will have been accomplished.

Note.

It has been maintained by a writer in a weekly journal, who is evidently not very conversant with the class of subjects he has undertaken to discuss, that the doctrines of M. Hautefeuille and Dr. Phillimore are intended to be merely speculative opinions, and not practical rules. This is a sort of argument of which it might be sufficient to say *solvitur legendo.* Why does M. Hautefeuille argue, through several pages, to prove that Lampredi was altogether wrong, if he did not mean to controvert the conclusions to which that writer had arrived? Why does Dr. Phillimore express his dissent from Chief Justice Story, if all the time he really agrees with him? If M. Hautefeuille is right in saying that trade in contraband within the neutral territory, carried on by neutral subjects with one belligerent, affords to the other belligerent a lawful cause of war, it is simply nonsense to pretend that it is not the duty of the neutral Government to prohibit such a trade. Why is the cause of war against the neutral Government justifiable, if that Government has not failed to do something which it was bound under that penalty to perform? What is the breach of duty on the part of the neutral for which M. Hautefeuille pretends that the belligerents may make war, except that of prosecuting a trade which he asserts to be prohibited? If such a trade, on the part of some of its subjects, justly brings on the whole community the scourge of war, a Government which

neglected to prohibit and prevent it would fail in its highest obligations towards the State. If M. Hautefeuille is right, I should like to know why England and France did not compel Belgium, by a menace of war, to abstain from trade with Russia in contraband during the Crimean war? The reason they did nothing of the sort is simply this: because, however much, according to the opinion of these writers, they might have acted in so doing in consonance with the principles of 'eternal justice,' in the just judgement of all mankind they would have committed a gross and flagrant breach of the known Law of Nations. If these are speculative opinions, all I can say is, that such speculations are most unfortunate; and are not unlikely, if they should obtain currency, to have the most practical and diastrous consequences. I may be permitted also to enquire, where, if these are only speculations, are the practical rules on the subject to be found in these bulky volumes, professing to treat of the Law and Practice of Nations?

II.

MARINE INSURANCE ON CONTRABAND TRADE.

THE length of my last letter did not permit me to cite some American authorities, which have an important bearing upon the subject under discussion. As these may, nevertheless, interest your readers, I will ask leave to add them by way of supplement.

Every lawyer will at once see the materiality to the subject in hand of the Law of Marine Insurance. It is a settled principle, that a policy of insurance on an adventure prohibited by the law of the country in which it is effected is absolutely void. A policy, therefore, made in the belligerent country upon a contraband shipment would be clearly bad. But it has been distinctly held in the American courts for more than half a century, that a policy effected in the neutral country upon the shipment to a belligerent country of a contraband cargo is valid, and may be enforced at law. This is, in effect, to decide, that not only the traffic in contraband within the neutral territory is lawful, but that even the transport of contraband to the belligerent country is no offence against the laws of the neutral State.

This doctrine is very explicitly expounded in a judgement of the Supreme Court of Massachusetts, to which I referred in my last letter. It is enough to say of it, that it has the express sanction and approval of Chancellor Kent (*Comment.* vol. iii. p. 468):—

> The last class of cases we shall mention is the transportation by a neutral of goods contraband of war, to the country of either of the belligerent Powers. And here it is said these voyages are prohibited by the law of nations, which forms part of the municipal law of every state, and, consequently, that an insurance on such voyages made *in a neutral State* is prohibited by the laws of that State, and, therefore, as in the case of an insurance on interdicted commerce, is void. That there are certain laws

which form a part of the municipal laws of all civilised States, regulating their mutual intercourse and duties, and thence called the law of nations, must be admitted; as, for instance, the law of nations affecting the rights and the security of ambassadors. But we do not consider the law of nations, ascertaining what voyages or merchandise are contraband of war, as having the same extent or effect. It is agreed by every civilised State that if the subjects of a neutral Power shall attempt to furnish either of the belligerent Sovereigns with goods contraband of war, the others may rightfully seize and condemn them as prize. *But we do not know of any rule established by the law of nations that the neutral shipper of goods contraband of war is an offender against his own Sovereign, and liable to be punished by the municipal laws of his own country.* When a neutral Sovereign is notified of a declaration of war, he may, and usually does, notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that if they are taken in it he cannot protect them, but not announcing the trade as a violation of his own laws. Should their Sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as, on the one hand, he cannot complain of the confiscation of his subjects' goods, so, on the other, the Power at war *does not impute to him* those practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations, but if he ships goods prohibited *jure belli*, they may be rightfully seized and condemned. It is one of the cases where two conflicting rights may exist, which either party may exercise without charging the other with doing wrong. As the transportation is not prohibited by the laws of the neutral Sovereign, his subject may lawfully be concerned in it; and as the right of war authorises a belligerent Power to seize and condemn the goods, he may rightfully do it. But we know of no case where the neutral merchant has been punished by his own sovereign for his contraband shipments. If he will adventure on the trade, and his effects are seized and condemned as prize, to this penalty he must submit, and his Sovereign will not interfere, because the capture was lawful. And it may be further observed, that if the exportation of contraband goods from a neutral country to a port of either of the Powers at war is a trade which from its nature is prohibited by the laws of the neutral Sovereign, then the policy on such goods would be void, and the assurer would be exempted from any loss or damage arising from the dangers of the sea. But an exemption of this kind is not founded on any sound principle, nor is it supported by any usage. ('Richardson *v.* Marine Insurance Company,' 6 *Mass. Rep.*, 102 [1809]).

Such is the doctrine laid down in the very sanctuary of Northern Republicanism. Let us see what is the view of the 'Empire State.' The following passage is from a judgement on an insurance case in the Supreme Court of New York, pronounced in 1799 by Mr. Justice Kent:—

On the first point I am of opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported by the positive

law of the country is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law contraband trade is prohibited to neutrals, and, consequently, unlawful. *This reasoning is not destitute of force, but the fact is that the law of nations does not declare the trade to be unlawful.* It only authorises the seizure of the contraband articles by the belligerent Powers; and this it does from necessity. *A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade*; and yet at the same time, from the law of necessity, as Vattel observes, the Powers at war have a right to seize and confiscate the contraband goods, and this they may do on a principle of self-defence. The right of the hostile Powers to seize, the same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. The trade by a neutral in articles contraband of war is, therefore, a lawful trade, though a trade, from necessity, subject to inconveniences and loss. ('Seton *v.* Low,' Johnson's *Cases*, vol. i. p. 1.)

This case, though questioned on a collateral point, has ever since been considered, as to its main principle, good law in America. And Kent, while admitting the error of the decision on the point of notice, re-affirms the judgement of the early days of his magistracy in his latest work (*Comment.*, vol. iii. page 268):—

An insurance, then, by neutrals in a neutral country is v lid, whether it relates to an interloping trade in a foreign port, illicit *lege loci*, or to a trade in transporting contraband goods, which is illicit *jure belli*.

It will be observed that the doctrine of these cases goes further than in my last letter I thought it right to proceed. They establish not only the legality of the *traffic* in, but the *transport* of, contraband; and certainly, as against an American complainant, it is impossible to conceive anything more conclusive. At the same time, while I cite these judgements, I think it right to warn your commercial readers that this point as to neutral insurance on contraband adventures is not altogether free from doubt or controversy. Mr. Duer, the American writer on marine insurance, has questioned the propriety of the American doctrine at the end of the first volume of his able and interesting work. It is singular enough that the English courts of law have not yet been called upon to decide this question — partly, perhaps, because England has seldom, in the course of her history, enjoyed the advantages of a neutral position; principally, no doubt, because the insurance offices of this country have been too honest or too prudent to dispute the force of liabilities from

which they have derived large profits. It may, perhaps, be doubted how far it is possible to reconcile the American decisions with such cases as that of 'Harratt v. Wise' (9 *Barn. and Cress.*, p. 712), where it seems to have been assumed that a policy on a voyage to a blockaded port with knowledge of the blockade was an illegal risk. Nevertheless, Mr. Arnould, the very able English writer on marine insurance, has adopted the American view without reserve. And even Mr. Duer, while attacking the doctrine, admits that the universal Continental practice, including Prussia, Sweden, Italy, Hamburg, Amsterdam, and other places, is in favour of such insurances. All that can be said upon the subject is that in America the law is settled, and in England it is not yet decided. Upon a subject of so much nicety and importance, I forbear to obtrude my own opinion. I am not affiliated to any of the modern associations for 'world-bettering,' whose fundamental doctrine seems to be the necessity for the subversion of all law. I am, therefore, mean-spirited enough to be content not to be 'wise beyond that which is written.'

I confine my affirmations to that which is settled beyond the reach of controversy—viz., the absolute legality of all manner of trade within the neutral territory, and the absolute irresponsibility of the neutral Government for the traffic of its subjects, whether in the sale or in the transport of contraband.

Note.

It is a very singular thing, as I have already observed, that the validity or invalidity of insurance on a contraband voyage should still be a question not absolutely decided by the courts of this country. Since these letters first appeared in the *Times* newspaper, I have had the satisfaction of receiving the assurance of the concurrence and approbation of the doctrines they attempt to expound from the most eminent practitioners in Westminster Hall. I am especially happy to be able to record the assent of a lawyer than whom the profession counts no sounder

opinion, and who is justly confided with a practice second to none in the profession. In the preceding letter I declined to express an opinion of my own on the important subject to which it refers. But I may now venture to state, on the authority of the gentleman to whom I refer, that the opinion of the profession in this country is completely in accord with the current of the American decisions, and that the advice which has been given to the mercantile community is, that insurances on contraband voyages are valid insurances, capable of being enforced at law.

The grounds, it will be seen, upon which the American decisions are founded are two. The first (which by itself is sufficient to dispose of the question) is, that the transport in contraband is not by the Law of Nations an illegal trade in the sense that it is any violation of law or wrongful act on the part of the neutral. The neutral exercises his right to trade subject only to the adverse right of the belligerent to seize. But neither the one in transporting, nor the other in seizing the merchandise, is guilty of an unlawful act. It is a conflict of rights, and not a case of wrong on either side. This is the view expressed by Kent, and which is completely in accordance with the doctrine of Vattel on this point.

One of the greatest vices of M. Hautefeuille's system is, that he has chosen—following in the wake of the interested and inaccurate sophists of the Armed Neutrality—entirely to deny and set aside the fundamental doctrine of the conflict of rights, which is the real key to the interpretation of the questions which in various shapes arise between belligerents and neutrals. In the place of this doctrine, which is universally adopted by all the older and authoritative publicists, M. Hautefeuille has chosen to substitute his own conception of a primary duty in either party. This unwise and unjustifiable departure from ancient principles has involved him in every department of his work in inextricable confusion. Dr. Phillimore, in a note to the sections of his book, which have been already referred to, seems to grudge M. Hautefeuille the credit of this precious discovery. I should recommend Dr. Phillimore to leave to M. Hautefeuille the sole responsibility of a theory which is absolutely destructive of the established Law of Nations.

In the well-known case of Barker *v.* Blake (9 *East Rep.* 292) the masculine intellect of Lord Ellenborough has expounded the true doctrine on this point with his accustomed clearness. That was a case in which the question arose on a policy effected upon enemies' goods carried in a neutral vessel. Without entering into the details, it is sufficient for the present purpose to quote the following passage from the judgement:—

> The *American* was at liberty to pursue his commerce with *France*, and to be the carrier of goods for *French* subjects; at the risk indeed of having his voyage interrupted by the goods being seized; or of the vessel itself, on board of which they were, being detained, or brought into *British* ports, for the purpose of search: but the mere act of carrying such enemies' goods on board his vessel constituted no violation of neutrality on the part of the *American*; nor did the arrest and detention of his vessel, for the purpose of search and eventual condemnation of the goods which might be found on board belonging to the enemy, form any breach of our duty towards the *American*. The indemnity sought under the policy in this case is not an indemnity to an enemy or to a neutral forfeiting his neutrality by an act hostilely done by him against the interests of *Great Britain*; but an indemnity to a neutral, as such, against the consequences of an act innocently and allowably done by him in the exercise of his own neutral rights; and as innocently and allowably to a certain degree controlled and interrupted on our part, in the exercise of our rights, as belligerents, against enemies' property found on board the ship of a neutral. These rights, though they are in a degree adverse to each other, do not, therefore, in the exercise of them, necessarily place either party in the situation of an enemy to the other. The various competitions for commercial advantage and superiority, which take place between different nations; their mutual exclusions of each other by their respective municipal regulations; are so many acts of adverse policy and conflicting rights, exercised towards each other, but they occur without producing any breach of national amity. And it has never yet, in any instance that I am aware of, been held a breach of implied duty in the subjects of either State to lend their assistance by insurance or otherwise to such rival of exclusive commerce or interests of the other. Cases of express public prohibition, and that degree of assistance to enemies which constitutes a society in war against any particular State, fall of course under a different consideration, and are necessarily to be understood as interdicted subjects of insurance in every country to which this species of contract is known. The voyage and commerce, therefore, in the course of which the vessel carrying the goods insured was in this case engaged, not being either of a hostile description, nor in any other way expressly or impliedly forbidden by the law or policy of this country, the general objection to the plaintiff's recovering at all under this policy of assurance falls to the ground.

It will of course be seen, that though this case fully recog-

nises the doctrine of a conflict of rights, and that principle of necessity to which M. Hautefeuille so vehemently objects, it does not by any means conclude the question of insurance on contraband.

Mr. Duer's argument on the other side of the question is, however, well worthy of consideration. The writer in the weekly papers to which I have before referred, seems to have been incapable of comprehending the real scope of the American author's remarks. Mr. Duer is much too sound a lawyer ever to have disputed the legality of neutral trade in contraband within the neutral territory. He left all the distinction of such a paradox to M. Hautefeuille and his disciples. What Mr. Duer says is, that the transport of contraband by the neutral must be illegal and wrongful; otherwise by what right can the belligerent be entitled to confiscate it? And in this respect he distinguishes it from such a case as that in 'Barker *v.* Blake,' where the enemy's property on board the neutral vessel is not confiscated in the same manner, but the shipowner receives freight, and the transaction is rather that of substituting the belligerent for the original consignees than one of confiscation. There would be more force in this argument if it were not the fact that in former times and in other countries—as, for instance, in France —the hostile goods on board the neutral vessel were subject to confiscation, just as contraband is now by the modern usage. So that the difference between the two cases is rather accidental, and one arising from modification of practice, than one of principle, indicating some distinction of rights. The true answer to Mr. Duer lies in the principle of the conflict of rights. The seizure depends not on the wrongful conduct of the neutral, but on the right of the belligerent. The right of the belligerent may have been at some times and in some cases more or less extensive, according as the usage and law of nations permitted, but the right, whatever it might be in the one party, does not create a wrongfulness in the other.

Mr. Duer insists, not without some force, on the cases of 'Harratt *v.* Wise' (9 *Barn. and Cress.*, 712), 'Naylor *v.* Taylor' (*ibid.*, 715), 'Medeiros *v.* Hill' (8 *Bingh.*, 231), as proofs that the English courts have decided that a voyage with intent to break a blockade cannot be the subject of a valid

insurance. It is enough to say that those cases, though they may give colour to the opinion, do not decide the point. When the question comes before an English court for judicial decision, the point will be one deserving of the highest consideration, and the result will be of the greatest interest to lawyers. The cases, however, of contraband and breach of blockade are not precisely identical. Possibly the more highly penal consequences of the confiscation of the vessel in the case of breach of blockade might be supposed to make some distinction in this particular case.

The second point laid down in the Massachusetts case is also deserving of notice. It is there said that too wide an extension has been given to the proposition that 'the law of nations is part of the law of the land.' In a certain and limited sense, this maxim is unquestionably true. Where the Law of Nations prescribes a duty to be performed within the territory, as, for instance, in the case of the immunity of the ambassadors, the law takes cognisance of and enforces the right; but it is quite a different thing when the right is one which does not arise within the territory, and with which our municipal laws have nothing to do. In such a case it seems to be the American doctrine, that the law of the land can take no more notice of such rights than it does of offences against the revenue or other laws of a foreign State. And on this ground they would hold a contraband like a smuggling voyage to be *res inter alios acta*, with which the municipal law has no concern.

BELLIGERENT VIOLATION OF NEUTRAL RIGHTS.

[Before I ventured to submit to public attention the following attempt to investigate an important and difficult question which profoundly affects the relations of States, I thought it right to submit the argument to the consideration of several persons on whose opinions and judgement I could confidently rely. I have been happy to find that since its publication the opinions of many of the most eminent members of the profession have confirmed the conclusions to which this course of reasoning has conducted me.]

BELLIGERENT VIOLATION OF NEUTRAL RIGHTS.

There are no questions which at the present time more deeply engage the public mind than those which concern the rights and duties of neutral Governments in their relations with belligerent Powers. Some of these questions, happily, are ascertained and settled beyond the reach of controversy, so that among civilised nations, recognising the obligations of public law, no doubts can be reasonably entertained. The doctrine as to contraband traffic within the neutral territory, to which I have recently had occasion to ask the attention of your readers, is one of these decided points. On such a topic it is only necessary that the law should be accurately stated in order to command universal acquiescence.

There are other questions relating to this important head of law which are by no means so simple or so entirely free from ambiguity, yet which it is of the highest importance to have thoroughly and correctly understood. Among these is the nature of the relative rights and duties which may arise as between the respective parties out of a violation of the rights of neutrals by one of the belligerents. As this interesting and

somewhat complicated question is nowhere very satisfactorily treated in the ordinary text-books, and has been considerably obscured by the loose language of unprofessional politicians, I shall ask your leave to offer some observations which may help to place the discussion on its proper and scientific basis.

The elementary and universal principle which lies at the root of the whole question is the absolute title of the neutral sovereignty to immunity, whether as regards its territory or its prerogatives, from the interference of belligerent operations of any kind. A violation of this immunity is one of the clearest and highest offences against public law. For one belligerent to pass through the neutral territory without the leave of its Sovereign—to carry on hostile operations within the neutral jurisdiction—to levy soldiers or sailors, or to equip vessels of war within the neutral soil—are familiar instances of violations of the rights of neutral sovereignty. They are acts eminently unlawful, and the neutral Government is entitled to prohibit, and, if necessary, to avenge their commission. In order the more clearly to illustrate the argument, I will select the particular instance of levying forces and equipping armaments by one of the belligerents within the neutral territory without the leave of its Sovereign, in order accurately to examine the rights and duties to which such an act gives rise. It is now admitted on all hands (though the matter was at one time faintly disputed) that such conduct on the part of a belligerent is a gross violation of the rights of the neutral Sovereign. That this must be so is obvious, and that on two distinct and sufficient grounds, both as regards the conduct of the enlisting belligerent and that of the enlisted subject. First, the exclusive right of making peace and war resides in the Sovereign alone. For a subject of the neutral Crown to engage on his own account in war with a foreign Power, or for a foreign belligerent to induce him so to engage, is a violent impeachment of the prerogative of the Sovereign. It is a gross contempt of 'the Queen, her crown and dignity.' If one neutral subject may do this, a million may do the same. Nay, we might have the State collectively at peace, while every one of its subjects was actually at war. It is, therefore, the clear right and paramount interest of the neutral Sovereign to take adequate measures in

order to prohibit and prevent the occurrence of so dangerous an absurdity. So much for the breach of duty as between the neutral Sovereign and his subjects. But, secondly, such acts are a clear violation of right as between the offending belligerent and the neutral Government. It is the unquestionable privilege of the neutral Government to bar the intrusion of belligerent operations from the sacrosanct limits of the neutral jurisdiction. '*Procul, O! procul este, profani!*' To levy men or to equip armaments within the neutral jurisdiction is to convert the sanctuary of neutrality into the theatre of war. Such proceedings are, therefore, upon both grounds in the highest degree unlawful: municipally as between the Sovereign and the subject, internationally as between the offending belligerent and the offended neutral. They constitute an offence clearly punishable at common law, and the Foreign Enlistment Act can only be regarded as a municipal statute intended to provide a convenient remedy against all persons and things within the allegiance of the neutral Crown.

And this is what is really meant when it is said that the Foreign Enlistment Act is founded on international law: a proposition unquestionably true, if it is understood of the obligation of the belligerent towards the neutral, and not of the neutral towards the belligerent. Every State passes laws to protect itself, and not to protect other nations. It is for this reason that the English Government has constantly refused to enact laws, either penal or otherwise, at the instigation of other Governments, who suggested that they might be essential for their security. The object of the statute-book in these matters is to prevent foreign nations injuring us, not to protect them one from another. That this was the true scope and intent of the Foreign Enlistment Act is proved by the language and conduct of Mr. Canning, as quoted by Mr. Huskisson, in a speech which is cited in a subsequent letter. And this is clearly what Kent means when he says (vol. i. p. 122), 'The Government of the United States was warranted by the law and practice of nations, in the declarations made in 1793, of the rules of neutrality, which were particularly necessary to be observed by the belligerent Powers in their intercourse with this country.' Offences of this description were no

doubt punishable at common law, but a statute was requisite in order to give precision to the remedy, and to give extraordinary powers of seizure and detention. As regards the offending belligerent, the remedy of the injured neutral is far more extensive, and the latter, in default of reparation, is entitled to vindicate his violated immunity by reprisals or by war.

So far the matter is clear enough, and the propositions I have stated will be at once admitted. A difficulty, however, begins to arise when we come to consider the relations which this violation of the neutral sovereignty creates, as between the neutral and the other belligerent who may have been indirectly injured by that violation. Upon this point I have come across a great deal of loose and inaccurate talking and writing, which makes it desirable and necessary to ascertain and establish the strict law of the case. The fundamental proposition which I wish to impress on your readers' attention (the importance of which I shall presently show) is, that the right which is injured by the act of the offending belligerent is the right of the neutral Government, and not that of the other belligerent. The important consequence of this proposition is, that it is the neutral, and not the belligerent, who is strictly entitled to claim or to enforce the remedy. When this point is once properly apprehended, the solution of the question becomes simple and satisfactory.

The profound and accurate juridical intellect of Grotius has fully seized the necessity of this distinction. Speaking of the violation of the neutral territory by hostilities carried on within it, he says:—

> In territorio autem pacato quod eos interficere aut violare non licet, *id jus non ex ipsorum venit personâ, sed ex jure ejus qui ibi imperium habet.* (Grot., lib. iii. cap. iv. § 8.)

And, again, on the cognate question of captures made within the territorial jurisdiction:—

> Solet et hoc quæri, an extra territorium utriusque partis bellum gerentis capta fiant capientium; quod et de rebus et de personis solet in controversiam vocari. *Si jus solum gentium respicimus, puto locum hic non considerari,* sicut et hostem ubique recte interfici diximus. *Sed qui in eo loco imperium habet potest lege suâ prohibere ne id fiat, et si contra legem factum sit, de eo anquam de delicto poscere potest ut sibi satisfiat. Simile est quod in agro alieno capta fera dicitur capientium fieri, sed a domino agri prohiberi posse accessum.*

Bynkershoek carefully insists on the same distinction :—

Jure belli adversus hostem duntaxat utimur in nostro, hostis, aut nullius territorio. Sed in territorio utriusque amici qui hostem agit, *agit et adversus principem, qui ibi imperat,* et omnem vim, a quocunque factam, legibus coercet. (*Q. J. P.*, l. i. cap. 8.)

Now the irresistible deduction from these principles is, that the right which is injured is the right of the neutral alone, and therefore that he is the only person who is entitled to complain of and to redress its infraction. It is, legally speaking, at the option of the neutral to assert or to release the right. '*Quilibet potest renunciare juri pro se introducto.*' The other belligerent who has suffered no legal wrong cannot substitute himself as a complainant.

The soundness of these propositions may be tested in various ways. For instance, it is now universally admitted that the passage of a belligerent army through the neutral territory without the leave of the Sovereign is a gross offence to the neutral Government. Nevertheless, if the neutral Sovereign chooses to permit it, the other belligerent who may suffer by it, having no right in the matter, has no ground of complaint. The language of Kent is express on this point :—

The right of a refusal of a pass over neutral territory to the troops of a belligerent Power depends more upon the inconvenience falling on the neutral State than on any injustice committed to the third party who is to be affected by the permission or refusal. *It is no ground of complaint against the intermediate neutral State if it grants a passage to belligerent troops, though inconvenience may thereby ensue to the adverse belligerent.* It is a matter resting in the sound discretion of the neutral Power, who may grant or withhold the permission without any breach of neutrality. (Kent's *Comment.*, p. 119.)

The language of this passage is substantially adopted from Lord Stowell's judgement in the case of the 'Twee Gebroeders' (5 Rob. *Rep.*).

Another example may be found in the doctrine with respect to the levies of troops in the neutral country. Kent says, vol. i. p. 116 :—

It is an essential character of neutrality to furnish no aids to one party which the neutral is not equally ready to furnish to the other. Mr. Manning, after referring to the practice of former times on the subject of foreign levies in neutral countries, and critically examining the reasoning of Vattel, justly concludes that foreign levies may not be allowed to one belligerent while

refused to his antagonist consistently with the duties of neutrality, unless such privilege was granted by treaty antecedent to the war.

It will be observed that this passage implies that the international duty is not to forbid such levies absolutely to both; but that it may lawfully be permitted, so long as it is permitted impartially to both. If there was any international duty towards one belligerent to prevent the other from raising levies in the neutral territory, such treaties in time of peace, as are here alluded to, would be *ab initio* unlawful and void.

But perhaps the most instructive illustration is to be derived from the practice in the case of captures made by a belligerent in violation of neutral rights. A capture made within the limits of the neutral jurisdiction is void, but it is void only at the suit of the neutral. If the neutral does not choose to interfere to assert his right, the capture is valid as against the other belligerent. In short, the capture is not void, but voidable at the election of the injured party — viz. the neutral State — a distinction the importance of which every jurist will appreciate. This is very clearly expounded in a judgement of the Supreme Court of the United States:—

A capture made within neutral waters is, as between enemies, deemed to all intents and purposes rightful; it is only by the neutral Sovereign that its legal validity can be called in question; and as to him, and him only, is it to be considered void. *The enemy has no rights whatsoever:* and if the neutral Sovereign omits or declines to interpose a claim, the property is condemnable *jure belli* to the captors. This is the clear result of the authorities, and the doctrine rests on well-established principles of public law. ('The Anne,' 3 Wheat. *Rep.*, 435, per Story, C.J., 1818.)

The English doctrine is precisely similar (vide the case of 'The Etrusco,' 3 Rob. *Rep.*, 162); and M. Ortolan writes to the same effect:—

Puisque la nullité des prises ainsi faites n'a rien d'absolu, qu'elle est subordonnée aux réclamations de l'état neutre, le fait est remis à l'appréciation de cet état. *C'est à lui à juger s'il y a eu ou s'il n'y a pas eu véritablement atteinte portée à sa souveraineté; s'il doit à sa propre dignité et aux obligations d'impartialité que lui impose sa qualité de neutre de réclamer contre cette atteinte, et de demander que les conséquences en soient annullées ou réparées; ou bien s'il peut garder le silence et n'élever aucune réclamation.* S'il réclame, et que ses plaintes soient fondées, le Gouvernement du capteur doit annuller la prise ainsi faite au mépris d'une souveraineté neutre; s'il ne réclame pas, nul est admis à le faire pour lui, et le Gouvernement du capteur n'a pas à tenir compte de pareilles objections. (Vol. ii. p. 256.)

This reasoning, it will be seen, equally applies, whether the capture is made in violation of the territory itself, or made without the territory by vessels which have been equipped in violation of the laws of the neutral State. The following passage is from a decision in the Supreme Court of the United States :—

A neutral nation may, if so disposed, without a breach of her neutral character, grant permission to both belligerents to equip their vessels of war within her territory. But without such permission the subjects of such belligerent Powers have no right to equip vessels of war, or to augment their force, either with arms or with men, within the territory of such neutral nation. Such unauthorised acts violate her sovereignty and her rights as a neutral. All captures made by means of such equipments are illegal *in relation to such nation,* and it is competent to her courts to punish the offenders, and, in case the prizes taken by her are brought *infra præsidia,* to order them to be restored. (Brig 'Alerta' *v.* 'Blas Mornet,' 3 Peters' *Cond. Rep.,* p. 425.)

This passage has a very material bearing as illustrating the true nature of statutes like the Foreign Enlistment Act. It shows decisively that they are purely municipal enactments for the protection and benefit of the neutral State, and not laws in furtherance of any international obligation due from the neutral to the respective belligerents. They create no new right in the belligerents; they impose no new duty on the neutral.

To my mind one of the most conclusive proofs that this is the true view of the case, is to be found in the power which is reserved to the Sovereign in Council to suspend the operation of foreign enlistment, and to relieve the subject of its obligations. Is it possible to conceive that such a dispensing power would have been granted if it had been supposed that the Legislature was dealing with a positive international duty, and not with a simple question of domestic policy? If policy and interest did not forbid, the neutral State would be at liberty to permit enlistment or equipment to either party so long as it acts impartially to both. But the forbidding a thing which the neutral is at liberty, if he chooses, to permit, cannot confer on the belligerent any larger right than that which he originally possessed. All that he can strictly claim is, that what is permitted to one shall be conceded to the other. When war between England and America last year was anticipated, the export of saltpetre was prohibited by an Order

in Council. Suppose that, in violation of that order, one belligerent had succeeded in running a cargo,—it would have been an offence against the English Government, but the other belligerent would have acquired no right to reparation.

If I have succeeded in making myself intelligible, your readers will have no difficulty in perceiving that an infraction by one belligerent of the Foreign Enlistment Act is, properly speaking, an offence solely against the neutral State, and violates no right inherent in the other belligerent. It is true the other belligerent may suffer inconvenience from the act; but as he is invested with no right, so, in the eye of the law, he sustains no injury. It is a case of that sort of loss which is termed by jurists *damnum absque injuriâ*.

Nevertheless, it will be found laid down by many writers of authority, that it is not only the *right*, but the *duty*, of neutral States to insist upon the immunity to which they are entitled, and to punish and redress all invasions of their territory or their law. Properly limited and explained, this proposition is perfectly sound. In the first place, it is clearly the *duty* of the neutral Government towards itself and its own people to assert the freedom of its own shores and the majesty of its own laws. But, apart from this, it is in a far more modified sense the *duty* of the neutral Government to regard the interest of the belligerent who may suffer from an impunity permitted to the other belligerent in the infraction of neutral rights.* But this duty, as I have endeavoured to show, is not a duty on the part of the neutral corresponding to any *right* vested in the belligerent, and is, consequently, at most what jurists call a *duty of imperfect obligation*. Let it not be supposed that this is an over-subtle refinement or a mere technical distinction. The difference is, in fact, of very great and practical consequence. If my neighbour builds up a wall and interferes with my ancient lights, he violates my rights. If he has an unfortunate taste for playing the cornet-à-piston at four o'clock in the morning, or gives a ball next door when I am seriously ill, he is a great nuisance;

* Upon the question of the distinction between duties of perfect and imperfect obligations and their relations to law, some valuable remarks will be found in Rutherforth's *Institutes*.

but he injures no right which I am entitled to assert. It may be in a certain sense his duty to abstain from all acts of annoyance, but there is this important difference between the two cases, that in one I am entitled to a complete remedy, and in the other I must content myself with a remonstrance. I do not, of course, put these as parallel cases, but they help to illustrate the principle. The important point to observe is the distinction as to the remedy. If the belligerent who is injured by the breach of the neutral sovereignty had any *right* invaded, he might demand at the hands of the neutral a distinct, definite, complete indemnification, at whatever risk or price, for all the acts of the offending belligerent, immediate and consequential. In such a case the neutral Government might be treated as an insurer against the wrongful acts of the aggressive belligerent. But, there being no such complete right in the belligerent, there is no such absolute duty or extensive liability on the part of the neutral. The true distinction between duties of perfect and imperfect obligation lies in the determinate or indeterminate character of the thing to be done. Thus, it is a perfect obligation to pay the exact amount of a debt. It is right that we should be charitable; but the object of charity, however deserving, has no right to any specific bounty at our hands. Even M. Hautefeuille has been able to perceive the absurdity of the proposition of Galiani, that the neutral Government is 'responsible for negligence in the vindication of its violated neutrality,' if by this it is intended that the neutral Government is bound itself to make good to the belligerent the damage he may have sustained. The limits of the duty of neutrals in this respect are laid down with considerable precision in a judgement of the Supreme Court of the United States:—

> The doctrine heretofore asserted in this Court is, that whenever a capture is made by any belligerent in violation of our neutrality, *if the prize come voluntarily within our jurisdiction*, it shall be restored to the original owners. This is done upon the footing of the general law of nations, and the doctrine is fully recognised by the Act of Congress of 1794. But the Court has never yet been understood to carry its jurisdiction in cases of violation of neutrality beyond the authority to decree restitution of the specific property, with the costs and expenses during the pending of the judicial proceedings. We are now called upon to give *general damages* for plunderage, and if the

particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages to the same extent as in ordinary cases of marine torts. We entirely disclaim any right to inflict such damages, and consider it *no part of the duty of a neutral nation to interpose upon the mere footing of the law of nations to settle all the rights and wrongs which may grow out of a capture between belligerents.* Strictly speaking, there can be no such thing as a marine tort between the belligerents. Each has an undoubted right to exercise all the rights of war against the other, and it cannot be a matter of judicial complaint that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify. The captors are amenable to their own Government exclusively for any excess or irregularity in their proceedings; and a neutral nation ought not otherwise to interfere than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction. *A neutral nation may, indeed, inflict pecuniary or other penalties on the parties for any such violation; but it then does it professedly in vindication of its own rights, and not by way of compensation to the captured.* When called upon by either of the belligerents to act in such cases, all that justice seems to require is that the neutral nation should fairly execute its own laws, and give no asylum to the property captured. *It is bound, therefore, to restore the property if found within its own ports; but beyond this it is not obliged to interpose between the belligerents.* ('La Amistad de Rues,' 5 Wheat. *Rep.*, 389, per Story, C. J., 1820.)

The principle to be deduced from this decision is, that the neutral Power cannot be called upon by the injured belligerent to grant him any remedy beyond that which may be exercised over property or persons who are at the time within the neutral jurisdiction. It is true that, in the celebrated case of the Portuguese expedition to Terceira, it was contended by the Duke of Wellington's Government that an expedition having fraudulently evaded the English jurisdiction, and started from these shores in violation of the Enlistment Act, the English Government was entitled to pursue and seize the ships beyond the jurisdiction. And though this opinion receives some countenance from the *dicta* of the Court in the American case of the 'Marianne Flora' (11 *Wheat.*, 42), nevertheless this doctrine was vehemently, and it is generally thought successfully, controverted by the minority, of whom Sir J. Mackintosh and the late Dr. Joseph Phillimore and Mr. Huskisson were the principal spokesmen (vide *Hansard*, vol. xxiv., new series). At all events, I think it is quite clear that, whether such a *right* exists or not on the part of the neutral, it is not a *duty* on his part which the belligerent can call upon him to enforce.

The real grounds on which the neutral is bound to do anything at all in the matter are first and principally in order to protect himself from that sort of retaliation which, by the law of impartiality, he would be obliged to concede to the injured belligerent against the aggressor; and secondly, though in a less degree, that he may clear himself from the suspicion of a fraudulent and unreal neutrality. A tame and spiritless submission to infractions of his rights would justly expose the neutral to the imputation of connivance with the party at whose hands they were sustained. In such a case the injured belligerent would be justly entitled to regard the professing neutral as in reality the ally of his foe. What circumstances are sufficient to justify such an inference of connivance is no doubt a difficult question of fact. It is also in the highest degree the interest of the neutral to prevent that being done by one belligerent which he must in turn concede to the other, and which would in the end turn the neutral territory into the belligerent battle-field.

And this is the ground on which the duty is put by Kent:—

> The neutral is to carry himself with perfect equality between both belligerents, giving neither the one nor the other any advantage; and if the respect due to the neutral territory be violated by one party without being promptly punished by just animadversions, it would soon provoke a similar treatment from the other party, and the neutral ground would become the theatre of war.

And again, speaking of prizes taken within neutral waters:—

> If any complaint is to be made on the part of the captured, it must be by his Government to the neutral Government for a fraudulent, or unworthy, or unnecessary submission to a violation of its territory, and such submission will necessarily provoke retaliation (i. e. by the other belligerent violating the territory in his turn).

But the duty of the neutral towards the injured belligerent being, as I have said, one of imperfect obligation, and arising out of no right of the belligerent, the discretion as to the nature and extent of its performance must, as M. Ortolan observes, lie wholly in the breast of the neutral Government. If this were not so, the monstrous consequence would ensue, that, because two powerful States went to war, another State, which has no sort of interest in the quarrel, would forfeit the highest of all national rights, viz. that of remaining at peace. Is it to be

tolerated that, because one belligerent injures a neutral State, the other belligerent shall be entitled to inflict upon it the still greater injury of compelling it, whether it will or not, to go to war? And so the belligerent, and not the neutral Sovereign, is to be the arbiter of the fate of the neutral country. If France and Russia were at war, and France violated the neutrality of Belgium, could Russia insist on Belgium quarrelling with France? Could it be pretended that the Confederate Government had a right to prescribe to the English Cabinet what redress they should demand for the outrage on the 'Trent' by Captain Wilkes? The whole difference lies in the distinction between the active and the passive conduct of the neutral. For the first he may be made responsible, but it would be the height of injustice to call a man to account for what he has endured. M. Hautefeuille, with a perversity eminently characteristic, argues (vol. i. p. 341, last edition) for the extreme view of the obligation of the neutral, from the absence of any direct right of reclamation in the belligerent. As though the fact that a man is not entitled to one remedy is a necessary proof that he is entitled to another, when the truth is, that, having no right, he is, properly speaking, entitled to no remedy at all. It is like the popular but unfounded supposition, that, because a man has no case at law, he therefore ought necessarily to succeed in equity.

I am not unaware that passages may be quoted from text-books, speeches, and despatches, which carry the right of the belligerent to reclaim, and the duty of the neutral to redress the violation of neutral rights a good deal higher than I have placed them. At the same time, it should be remembered that less weight is to be given to documents in which policy has a large share, than to the impartial and severe logic of judicial decisions, from which I have sought to extract the true definition of the rights and liabilities of the several parties. I am well acquainted with the diplomatic correspondence in the celebrated case of the capture of the French fleet in 1759, by Admiral Boscawen, in violation of the Portuguese neutral territory, which is cited by M. Ortolan. But any one who reads the singular and characteristic despatch of the first Pitt (which will be found in the Appendix to Lord Mahon's *History*,

vol. iv.), and considers the overbearing and tyrannical conduct of the Confederate Bourbon Monarchies towards the feeble victim of the 'family compact,' as detailed in the State papers collected in the *Annual Register* for 1762, will easily see that Portugal was not a free agent, and that this transaction is of little authority as an international precedent. The reciprocal claims of the French and English Governments on the Cabinet of Washington in the commencement of the revolutionary war have a far more weighty bearing upon the question in hand. Your readers who care to pursue the subject will do well to consult the first volume of the *American State Papers* and the last volume of Marshall's *Life of Washington*. It will be seen from the latter work, that in the discussions which took place in the American Cabinet, the opinions of Jefferson, the Secretary of State, and of Randolph, the Attorney-General, upon the legal bearings of the case, correspond pretty closely to those which I have ventured to set forth. It must, however, I think, be admitted that in this important international debate, the belligerents, as usual, claimed more than they were entitled to demand, and the neutral, as often happens, under the pressure of policy, conceded more than he could strictly have been required to grant. I certainly think that, if any similar questions should arise between the Governments which represent the parties to these transactions, the claims of the one and the concessions of the other on that occasion would be in a *political* point of view elements entitled to the highest consideration. But this department of the question is wholly beyond the province of the discussion I have proposed. We are occupied with the examination, not of that which may be politically expedient, but of that which is internationally exigible. We are seeking to ascertain the limits of legal rights, and not the conditions of political reciprocity.

On the whole, I think it may be concluded that a breach of the laws of a neutral State by a belligerent power is a grave offence, which it is the unquestioned right of the neutral to punish and redress. It highly concerns the dignity and independence of the neutral State so violated to assert its injured right, and to insist upon the fullest and most complete reparation as against the offender, by judicial remedies within its own

jurisdiction, by diplomatic reclamations, if by accident or fraud its jurisdiction has been eluded. The other belligerent, who, though he may have sustained injury, has suffered the violation of no right, has no definite or lawful claim upon the neutral for reparation. He may urge upon the neutral, by way of remonstrance, the duty of obtaining redress for him at the hands of the offender; this, however, is only a duty of imperfect obligation. He cannot demand at the hands of the neutral, as of right, compensation for the injury he may have sustained, nor can he impose upon the neutral the duty of obtaining for him any remedy beyond that which may be had over persons or things which are *infra præsidia*, and consequently within the neutral jurisdiction. If the offender has succeeded in evading the neutral jurisdiction, the belligerent cannot, as of right, call upon the neutral to pursue those further remedies to which the latter might be himself entitled.

I offer this attempt to elucidate a difficult and important subject to the candid consideration of those who are competent to judge of it, with the diffidence which my consciousness of its incompleteness necessarily inspires. I have carefully abstained from making any practical application of the principles on which I have insisted to the special case of the 'Alabama.' The facts of that case are far too incompletely stated, and too inaccurately known by the public, to justify any reasonable or discreet person in venturing to express an opinion upon the rights or duties to which they may give rise. Vehement partisans are governed in such matters by their partialities rather than their judgement. The jurist should know no distinction between the Trojan and the Tyrian camps. I have observed with considerable satisfaction that the letters which I have from time to time addressed to you have been in turn displeasing to each set of partisans who espouse opposite sides in the American quarrel. I desire no higher testimony to the impartiality it has been my object to observe.

ON THE FOREIGN ENLISTMENT ACT.

ON THE FOREIGN ENLISTMENT ACT.

At the present moment there is a good deal of discussion as to what acts constitute an offence against the provisions in the Foreign Enlistment Act, which prohibited the arming and equipping of vessels of war with the intent to commit hostilities against States with which the Crown of England is at peace. It will contribute not a little to throw light upon this enquiry, if we should be able to ascertain, on the authority of judicial decisions, what cases have been determined not to constitute such an offence.

I must first premise that the provisions of the American municipal law on this subject are so similar to our own as for the purposes of this discussion to be practically identical. A judgement, therefore, pronounced on the American statutes may generally be adopted as applicable to our own. The United States anticipated Great Britain in the policy of the Foreign Enlistment Act, and, indeed, our law is little else than a transcript of theirs. As early as 1794, Congress passed a statute from which it will be sufficient to quote a single section:—

> If any person shall, within any of the ports, harbours, bays, rivers, or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign Prince or State, to cruise or commit hostilities upon the subjects, citizens, or property of another foreign Prince or State with whom the United States are at peace, every such person so offending shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be fined and imprisoned, &c. (Third Congress, Sess. I. cap. 50, sec. 3.)

The following section makes similar provisions against increasing or augmenting the force of 'any ship of war or cruiser.'

The statute 1, cap. 1, of the Fifth Congress, Session 1, makes provision against the citizens of the United States fitting out or equipping vessels *without* the limits of the United States; and subsequently all the statutes were consolidated and amended by a statute in the year 1818, cap. 88, of which sections 3, 4, 5 refer to the question of equipment. Our English statute of the ensuing year closely followed this enactment. I do not think it necessary to enter into the minute differences in detail of these Acts, because the section I have quoted sufficiently shows the scope of the law.

Now, the application of these statutes was specifically raised in the case of the 'Santissima Trinidad' in the Supreme Court of the United States, to which I referred in my last letter. In that case, a libel was filed by the Spanish Consul against the cargoes of some Spanish ships, which were alleged to have been unlawfully and piratically taken out of those vessels on the high seas by two armed cruisers, which were stated to have been unlawfully equipped in the United States contrary to the statutes in question. The cargoes had been condemned in the Prize Court of Buenos Ayres, and had since come *infra præsidia* of the United States. The point made on behalf of the Spanish owners was that 'the capturing vessels were originally equipped, fitted out, armed and manned in the United States, contrary to law.' (*Vide* Webster's argument, *Wheaton's Reports*, vol. vii. pp. 319 321.) The question of the application of the American Enlistment Act was therefore specifically raised for adjudication. The facts are thus stated by Story, C. J., in the judgement of the Court:—

The ship was originally built and equipped at Baltimore as a privateer during the late wars with Great Britain, and was then rigged as a schooner and called the 'Mammoth,' and cruised against the enemy. After the peace she was rigged as a brig and sold by the original owners. In January 1816, she was loaded with a cargo of munitions of war by her new owners (who are inhabitants of Baltimore), and being armed with twelve guns, constituting a part of her original armament, she was despatched from that port under the command of the claimant, ostensibly to the North West Coast, but in reality to Buenos Ayres. By the written instructions given to the supercargo on the voyage, he was authorised to sell the vessel to the Government of Buenos Ayres if he could obtain a suitable price. She duly arrived at Buenos Ayres, having exercised no act of hostility, but sailed under the protection of the American flag during the voyage. At Buenos

Ayres the vessel was sold to Captain Chaytor, and soon afterwards it assumed the flag and character of a public ship, and was understood by the crew to have been sold to the Government of Buenos Ayres. Captain Chaytor made known these facts to the crew, and asserted that he had become a citizen of Buenos Ayres, and had received a commission to command the vessel as a national ship, and invited the crew to enlist in the service, and the greater part of them enlisted accordingly.

Upon the point made at the bar, and upon this state of facts, the Court pronounced the following judgement:—

The question as to the original illegal armament and outfit may be dismissed in a few words. It is apparent that though equipped as a vessel of war, she was sent to Buenos Ayres on a *commercial adventure*, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bonâ fide* sale (and there is nothing in the evidence before us to contradict it), there is no pretence to say that the original outfit on the voyage was illegal, or that a capture made after the sale was for that cause alone invalid.

Upon the second point—viz. the subsequent return and further refitting and augmenting of the armament of the vessel—the decision of the Court was adverse to the ship.

There is another judgement of the Supreme Court upon these statutes which may be studied with advantage. The case of 'The United States *v.* Quincey' was a prosecution instituted under the American Foreign Enlistment Act, and the Court was called upon to lay down the instructions on the points of law which were to be given to the jury. The following passages from the judgement are material:—

The second and third instructions asked on the part of the defendant were—

That if the jury believe that when the 'Bolivar' was fitted and equipped at Baltimore, the owner and equipper intended to go to the West Indies in search of funds with which to arm and equip the said vessel, and had *no present intention* of using or employing the said vessel as a privateer, but intended, when he equipped her, to go to the West Indies to endeavour to raise funds to prepare her for a cruise, then the defendant is not guilty.

Or if the jury believe that when the 'Bolivar' was equipped at Baltimore, and when she left the United States, the equipper *had no fixed intention to employ* her as a privateer, but had a wish so to employ her, the fulfilment of which wish depended on his ability to obtain funds in the West Indies for the purpose of arming and preparing her for war, then the defendant is not guilty.

We think these instructions ought to be given. The offence consists principally in the intention with which the preparations were made. These preparations, according to the terms of the Act, must be made within the limits of the United States, and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. And this must be a fixed intention, not conditional or contingent, depending on some future arrangements. This intention is a question belonging exclusively to the jury to decide. It is the material point on which the legality or criminality of the act must turn, and decides whether the adventure is of a commercial or warlike character.

The law does not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports; it only requires the owners to give security (as was done in the present case) that such vessels shall not be employed by them to commit hostilities against foreign powers at peace with the United States.

The collectors are not authorised to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances shall render it probable that such vessels are intended to be employed by the owners to commit hostilities against some foreign Power at peace with the United States. ('United States *v.* Quincey,' 6 *Peters' Reports,* 465 [1832].)

I regret that my avocations do not permit me at this moment to illustrate as fully as I could have desired the legal principles to be deduced from these important decisions. I may be permitted, however, to observe, that they prove decisively that the Foreign Enlistment Act was not intended to, and did not in fact, operate so as in any way to limit or control the absolute freedom of neutral commerce. The Enlistment Act is directed, not against the *animus vendendi,* but the *animus belligerendi.* It prohibits warlike enterprises, but it does not interfere with commercial adventure. A subject of the Crown may sell a ship of war, as he may sell a musket, to either belligerent with impunity; nay, he may even despatch it for sale to the belligerent port. But he may not take part in the overt act of making war upon a people with whom his Sovereign is at peace. The purview of the Foreign Enlistment Act is to prohibit a breach of allegiance on the part of the subject against

his own Sovereign, not to prevent transactions in contraband with the belligerent. Its object is to prohibit private war, and not to restrain private commerce. Whether the despatch of the 'Alabama' from Liverpool was on the part of the persons concerned in it a commercial adventure or a warlike enterprise depends on the facts and evidence in the case, with which I am not acquainted, and on which, of course, I do not venture to pronounce.

Note.

In the haste with which this collection of notes on contemporary events has been necessarily thrown together, it has been impossible to give a fuller discussion to the real character and bearings of this important statute. There have been few, if any, decisions upon it in the English Courts. American jurisprudence is more copious on the subject. I believe the principle of interpretation laid down in the preceding letter, however, will be found to be the sound one. To equip and arm a vessel of war within the United Kingdom is not *per se* an offence against the statute: it is the equipping and arming *with intent to commit hostilities against a foreign Government* which constitutes the misdemeanor. The Act is directed, not against the '*caponantes bellum*,' but against the '*belligerantes*.' The mere sale or equipment for sale of a vessel is in itself no evidence of such an intent, which must be proved conclusively upon some better grounds. The manning of a ship for war purposes, and with a war crew, would be a much more cogent circumstance to lead to the inference of such an intent; because there the commercial speculation can hardly be severed from the belligerent animus. I had sought in vain, in the debates on the introduction of the English Foreign Enlistment Act, for a clue to the real view of its authors as to its foundation and its scope. The speeches of many of the most important persons are so imperfectly reported, and the argument is so mixed up with collateral political topics, that it is very difficult to deduce any clear conclusion from them. Indeed, so much is made of the treaty of 1814 with Spain, that it seems almost as if that was considered the main point of the question. However, as everyone knows, in a political

debate as in a cause at Nisi Prius, the great point is to get the verdict, and legal definitions are comparatively little regarded. I have, however, discovered an account of the view which the authors of the Bill, subsequent to its enactment, took of its provisions, and of their power and duty in respect of its enforcement. In the debate on the 'Terceira' business, this question was incidentally discussed, and the opinions and conduct of Mr. Canning, one of the principal authors and supporters of the Foreign Enlistment Act, were examined. Mr. Huskisson—himself no mean authority on such a question—spoke as follows, in 1830, in reply to Mr. Secretary Peel:—

His right honourable friend had referred to an opinion of Mr. Canning, delivered in the memorable debate on the Alien Bill (a mistake, probably, for the Foreign Enlistment Act), and it was principally to correct his right honourable friend's views on that point that he rose. He must remind his right honourable friend, therefore, that *the object of that Bill was to give the Government of this country a municipal power within its recognised limits which the Government otherwise could not exercise.* It might be supposed, from his right honourable friend's remarks, that during the fifteen years we have been at peace our neutrality had never before been violated. Had he forgotten, then, the repeated complaints made by Turkey? and had he forgotten that to these complaints we had constantly replied, 'We will preserve our neutrality within our dominions, but we will go no farther?' Turkey did not understand our explanation, and thought we might summarily dispose of Lord Cochrane and those other subjects of Her Majesty who were assisting the Greeks. To its remonstrances Mr. Canning replied, 'Arms may leave this country as matter of merchandise, and however strong the general inconvenience, the law cannot interfere to stop them. *It is only when the elements of armaments are combined that they come within the purview of the law; and if that combination does not take place till they have left this country, we cannot interfere with them.*' These were the words of *Mr. Canning, who extended the doctrine to steam vessels and yachts that might afterwards be converted into vessels of war,* and they appeared quite consistent with the law of nations. He would tell his right honourable friend, that if he acted on these doctrines (i. e. such as were professed by the supporters of the Government in the 'Terceira' affair), and pursued such policy, he would not keep for ten months, much less for ten years, out of war. At the very moment he was speaking, arms and clothing were about to be sent out of this country to the belligerents. Were they to be stopped, or were they to be followed and brought back? He believed the answer would be no; and if it were yes, of what use, he would ask, would be our skill in building ships, manufacturing arms, and preparing the instruments of war, if equally to sell them to all belligerents were a breach of neutrality? (*Hansard*, vol. xxiv. N. S. p. 209.)

Nothing can be more instructive or more conclusive than

this reading of the Foreign Enlistment Act, confirmed by the practice of its original authors. The period at which this discussion between the English and Turkish Governments arose, was within a very few years of the passing of the Foreign Enlistment Act. It must be regarded as the first authoritative exposition of its principles by the Government of this country. This exposition, it will be seen, establishes, first, that the Act was a municipal statute, and that its object was to give power to the neutral Government for its own protection against the intrusive belligerent, not to create any obligation towards or to supply the means of affording protection to the injured belligerent. Secondly, it shows that the authors of the Foreign Enlistment Act were not so absurd and illogical as to have forbidden the equipping and arming of a ship for sale, whilst they did not forbid the making and selling of a park of artillery. What they forbad to their subjects and to all within their jurisdiction, was the making war on people at peace with the Sovereign of these realms. The equipping and arming of a ship may or may not, according to circumstances, be evidence of such an intent; but if the evidence is not such as satisfactorily to establish the belligerent intent, there is no violation of the Act. It will be seen that this doctrine, laid down on the conjoint authority of Canning and Huskisson, is identical with that established in the case of the 'Santissima Trinidad;' and it is both law and common sense, which are not so seldom coupled together as ignorant persons are apt to suppose. It has been idly attempted to show, that the passages which have been cited from the judgement in the American case are mere *obiter dicta* of Chief Justice Story. Even if that were the case, they would be worth a good deal more attention than the positive asseverations on transcendental theories of most modern text-writers. But the fact is—as anyone who reads the report with the eye of the lawyer will see—that the status of the ship before she reached Buenos Ayres was an essential part of the decision. The words of this judgement are not the opinions of a particular judge, but the sentence of the Supreme Court of the United States, than which no higher authority on such a question is to be attained.

A LETTER ON THE RIGHT OF SEARCH.

THE following letter gives a very slight and elementary sketch of the principles of the law of belligerent search, and was written for the purpose of correcting some popular errors which seemed to have obtained a certain vogue. It was intended for the perusal only of those who are unacquainted with the rules of law on this subject, and has no pretension to be a thorough discussion of the question. It is republished here, chiefly because the writer was assured by a distinguished officer in the Navy, that even such a simple exposition of the law and practice of nations in these matters was useful and desirable. The gallant officer informed the writer that naval officers are constantly annoyed and embarrassed by expectations on the part of the mercantile community, that men of war should interfere in their favour in cases where such interference would be in the highest degree illegal and improper. It is fortunate that on these subjects 'R. N.'s' are a little better informed than the gentleman who wrote to the papers under the signature of 'M.P.' If naval officers were no better instructed in the law of nations than some members of Parliament, the navy estimates would soon become much more considerable even than they already are.

Elementary, certain, and settled, however, as these questions are, they are, one and all, either misrepresented or wholly perverted by M. Hautefeuille. His chapter on the right of visitation and of search is one of the most colossal monuments of nonsense which it is possible to find in the annals of jurisprudence. He founds his whole theory on the basis of an assumption that the right of visitation is solely a creation of treaties, and that it has no existence in the general law of nations. This monstrous hypothesis is borrowed, if I remember right, from the tract of Schlegel, who, as Mr. Ward says, 'augmented the sophistry of Hübner.' It is hardly necessary to say that such an assertion is wholly devoid of historical truth or legal probability—it is a mere audacious fiction, invented to square with a particular theory, and to serve the interests of particular parties. The whole superstructure of

paradox which is erected on this rotten foundation, of course, with it, falls to the ground. M. Hautefeuille, though admitting a right of *visitation*, after a fashion, which is the mere creation of his own brain, denies altogether the right of *search*. He demands that the belligerent cruiser shall be satisfied with certain formalities, which he takes upon him to prescribe; but he denies that any amount of suspicion would justify detention or search, and he even goes so far as to counsel neutral merchants forcibly to resist a search (*vide* vol. iii. p. 206), a piece of advice which I strongly recommend them not to follow, not so much for the sake of the law of nations, for which they probably care as little as M. Hautefeuille, but for the security of their own property, for which they are certainly a good deal more solicitous.

A LETTER ON THE RIGHT OF SEARCH.

I cordially concur with your correspondent 'R. N.' in the concern he has expressed at the deplorable ignorance of the most elementary principles of international law, which has been displayed in quarters where better information might have been expected, in respect of the incidents reported to have taken place off Madeira. The facts of the case, as stated, appear to be these:—The 'Thistle,' a British merchant-ship, was at anchor off Madeira. The 'Tuscarora,' a Federal cruiser, and the 'Leopard,' an English man-of-war, were also at anchor in the roads. The 'Thistle' slipped her cable, and steamed out to sea; the 'Tuscarora' followed, and overhauled the British merchant-vessel in a place which, in the original account, is distinctly stated to have been *five miles* from the coast. The 'Tuscarora,' in order to bring the 'Thistle' to, fired a gun which is not asserted to have been shotted, and despatched a boat, with an officer on board, who demanded a sight of the merchantman's papers. After inspecting the papers, he took his departure, and allowed the vessel to proceed. The original account of the Federal cruiser having overhauled the 'Thistle' a second time, has been subsequently contradicted.

It is inconceivable that attempts should have been made to manufacture a grievance out of a transaction so absolutely

lawful as this. I have been astonished to see in journals, from which one might have expected an acquaintance with such elementary rights as that of belligerent search, the conduct of the Federal cruiser treated as an outrage on the British flag, which an English man-of-war would have been justified in repelling. Lest your mercantile readers should be deceived by such paragraphs, it may be advisable, even at the risk of being tedious, to recall to their recollection the plain, indisputable, universally-admitted law of nations, which is nowhere better stated than in Lord Stowell's celebrated judgement in the case of the Swedish convoy :—

I state a few principles of the law of nations which I take to be incontrovertible.

1. That the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be their destination, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say be the ships, the cargoes, and the destination what they may, because till they are visited and searched it does not appear what the ships, or the cargoes, or the destination are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient enquiry whether there is property that can be legally captured, it is impossible to capture.

This being so, there can be no question that the 'Tuscarora' had a perfect right to overhaul and search the 'Thistle.' That the Federal cruiser had very good *primâ facie* ground of suspicion, cannot be disputed. In the present state of trade in contraband, a ship bound from the Clyde to Nassau is one whose innocence may be very fairly *primâ facie* questioned. In fact, the gentleman who records the transaction unconsciously confesses this, when he says — '*Considering the "Thistle's" destination*, it was not unnatural that she should keep a sharp look-out on her formidable neighbour.' Her 'formidable neighbour,' for precisely the same reason, had a good right to keep a sharp look-out on the 'Thistle.' When a trade in contraband is notoriously and extensively carried on, it exposes the innocent as well as the guilty to suspicion and search. And this is precisely the reason why the Queen, in her proclamation of neutrality, exhorts her subjects to abstain from such a trade.

The rights of the belligerent against the neutral are laid down by Lord Stowell with great precision under three distinct heads—

1. The right to send on board for the ship's papers.

2. The right to detain such vessels as are carrying cargoes of a contraband character, either wholly or in part, to an enemy's port.

3. The right to bring in for a more deliberate enquiry than could possibly be conducted at sea even those which profess to carry cargoes to a neutral destination.

And this brings us to the consideration of another part of the story, which assumes a much more grave and mischievous character. It is suggested rather than asserted that Her Majesty's ship 'Leopard,' which was lying in the Roads, was prepared, if necessary, to have resisted the search and possibly the capture on the part of the Federal cruiser. It cannot be too distinctly understood that any such resistance or interference on the part of an English man-of-war would have been in the highest degree unlawful and improper. I am happy to say that there is no evidence whatever beyond the loose statements of an ignorant writer that the commander of the 'Leopard' ever contemplated anything of the sort. As I have shown in my former letters, it is not part of the duty of the English Government to interfere in order itself to prohibit and prevent the trade of its own subjects in contraband of war. But its position as a neutral does impose upon it the absolute duty of withdrawing its protection from persons engaged in such a trade. For a ship of war of a neutral nation to interfere in the search or in the capture of a merchant-vessel by a belligerent cruiser would be a gross breach of neutrality, which the neutral Government would be bound to disavow, and for which it ought to make reparation. It is, in fact, nothing less than to endeavour to cover contraband trade by the protection of the neutral flag; for it is only by search that contraband trade can be controlled. The serious consequences of such an attempt were solemnly determined in the celebrated case to which I have already referred. Hear Lord Stowell again on the subject:—

The penalty for the violent contravention of this right of search is the confiscation of the property so withheld from visitation and search. For

the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern Professors of Public Law. In book iii. c. vii. § 114, he expresses himself thus:—'On ne peut empêcher le transport des effets de contrebande si l'on ne visite pas les vaisseaux neutres que l'on rencontre en mer. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents temps de se soumettre à cette visite; *aujourd'hui un vaisseau neutre qui refuseroit de souffrir la visite se feroit condamner par cela seul, comme étant de bonne prise.*' By the law of nations, as now understood, a deliberate and continued resistance to search on the part of a neutral vessel to a lawful cruiser is followed by the legal consequences of confiscation.

This being so, it is perfectly plain and unquestionable law, that if the 'Thistle' had herself resisted the search of the 'Tuscarora,' she would, even if she had had on board a perfectly innocent cargo, bound to a perfectly innocent destination, have incurred the absolute penalty of confiscation. If Her Majesty's ship 'Leopard' had aided and abetted such resistance, her commander would have committed a highly unlawful act, wholly inconsistent with the neutrality of the British Government. If the commander of the Federal cruiser had thought that either the nature of the cargo or the character of the papers of the 'Thistle' had justified him in carrying her for adjudication into a Federal prize court, the English man-of-war would have had no right to interfere. If the 'Tuscarora' acted improperly in the matter, it would have been for the prize court to award satisfaction to the owner of the 'Thistle.' The captain of the English man-of-war could not constitute himself a judge of the question which the Law of Nations has referred to a judicial tribunal. This is expressly laid down by the English Court of Admiralty:—

> Where the utmost injury threatened is the being carried in for enquiry into the nearest port, subject to a full responsibility in costs and damages, if this is done vexatiously a merchant vessel has not the right to say for itself, *and an armed vessel has not the right to say for it*, 'I will submit to no such enquiry, but I will take the law into my own hands by force.' What is to be the issue if each neutral vessel has a right to judge for itself, in the first instance, whether it is rightly detained, and to act upon that judgement to the extent of using force? Surely nothing but battle and bloodshed as often as there is anything like equality of force. For how often will the case occur in which a neutral vessel will judge itself to be rightly detained?

Every Englishman ought to know, and ought to remember,

that a whole fleet of Swedish merchant vessels was condemned by the English Court of Admiralty on the sole ground of a menaced, though unexecuted, resistance on the part of the Swedish convoying man-of-war to the English right of search.

The 'Madeira' case does not even raise the question of convoy, for there is no pretence that the 'Leopard' ever claimed the position of the authorised convoy as the 'Thistle;' and, consequently, the whole basis of the pretension to immunity, which rests on the warranty given by the ship of war that the merchant vessel was of an innocent character, is entirely wanting. But, as this question is collaterally suggested, I may take this occasion of reminding your unlearned readers that the claim to exemption from search and capture on the part of merchant vessels under convoy of a ship of war is wholly unfounded and unsustainable. The daring attempt to revolutionise the Law of Nations on this subject against the interests of England was set at rest by the final discomfiture of the Armed Neutrality, and by the maritime convention of June, 1801. Since that period, no legislative concurrence of States has operated to change the ancient and well-established rule of law. This being so, I need not say that the fraudulent attempts of text-writers to introduce, by the aid of misrepresentation, an innovation which arms failed to enforce, are absolutely idle. I have had occasion before to speak strongly on the subject of M. Hautefeuille's method of dealing with questions of international law. If I desired to justify all I have said of that writer by reference to a particular topic, I do not know that I could do better than point the attention of your readers to his treatment of this question of convoy in his chapter on the Right of Search (vol. iii. p. 135). I have neither the time nor the inclination to refute in detail this extraordinary tissue of misrepresentations. I will undertake, if ever it should be necessary, to show that the facts of history and the propositions of law stated by M. Hautefeuille on this subject are equally unfounded, and that the doctrine of the Law of Nations is exactly the opposite of that which he propounds in the following words:—'Ainsi donc je puis conclure que d'après ce droit secondaire les navires marchands neutres placés par leur souve-

rain sous l'escorte d'un bâtiment de l'état sont exempts de la visite.' He adds, 'Un seul auteur, Wheaton, paraît contraire à cette opinion' (vol. iii. p. 148). For the present it is enough to inform your readers that the unquestionable rule is exactly the opposite—viz. that no convoy is entitled to protect a neutral merchantman from the search and capture of a properly commissioned belligerent cruiser.

Chancellor Kent, a writer who, by the way, seems beneath the notice of M. Hautefeuille, writes as follows:—

> The doctrine of the English Admiralty on the right of visitation and search, and on the limitations of the right, has been recognised in its fullest extent by the courts of justice in America. *The very act of sailing under the protection of a belligerent or neutral convoy for the purpose of resisting search, is a violation of neutrality.* The Danish Government asserted the same principle in its correspondence with the Government of the United States, and in the royal instructions of March 10, 1810; *and none of the Powers of Europe have called in question the justice of the doctrine.*

Speaking of the attempt of the Baltic Confederacy to introduce the doctrine of exemption from search of ships under convoy, the same author says:—

> *The attempt was speedily frustrated and abandoned, and the right of search has since that time been considered incontrovertible.*

Now, in juxtaposition with these passages from the great American publicist, let me ask your attention to the following sentence of M. Hautefeuille, which is followed by whole pages of tirade against Great Britain:—

> *Une seule nation, la Grande Bretagne, élève aujourd'hui la prétension de soumettre à la visite les navires neutre convoyés.* (Vol. iii. p. 135.)

It is such reckless and unfounded assertions as these which, in my opinion, justify the severity with which I have spoken of a work which any one who reads the *Discours Préliminaire* will perceive to be actuated by a violence of passion and prejudice against England that makes accuracy of statement or fairness of argument impossible.

There is only one other point which I must notice. I have seen it asserted in journals, which should have been better informed, that we ought not to tolerate the American right of search, because the American Government denied that right to us in the case of the slave trade. This is a complete mistake,

and one which it is desirable decisively to correct. The right of search is exclusively a belligerent right. Neither the American nor any other Government has ever disputed the right of search *in war*. What the American Government denied in the discussions on the subject of the slave trade was the right of search *in time of peace*. In this discussion the American Government was unquestionably right in point of law. The English Government, without maintaining explicitly the right of search in time of peace—a pretension which would not bear argument—had contended for a modification of that right disguised under the name of a right of 'visitation,' which it was contended was necessary for the purpose of verifying the bonâ fides of the ship's flag, and ascertaining her nationality. This doctrine was, however, found on examination to be unsustainable, and the Government of Lord Derby in 1858 very properly intimated to the Americans their formal abandonment of the pretension.

The following words are from the speech of Mr. S. Fitzgerald, the Under-Secretary of Foreign Affairs, July 12, 1858 (*Hansard*, vol. 151, p. 1307):—

> As I stated to the House not long ago, as soon as Her Majesty's Government found that the right which we have hitherto asserted of verifying the national flag was one which we were not entitled to put forward, they thought it only becoming the dignity of a great nation at once to say so, and not to put forward a right which we could not justly and legitimately assert.

Lord Lyndhurst in the same volume (p. 2082) exposes the absurdity of the distinction between visit and search. He says:—

> What is the use of visiting if you can do nothing? The moment you ask a single question it becomes a search. But suppose a party visits only in the strict sense of the word, what right, I ask, has any person to go on board a vessel to visit it without the consent of the master? Lord Castlereagh in 1815 applied to the French Government to establish some mutual system by which cruisers could visit the vessels of each country; but the Duc De Richelieu replied that France would never consent to a maritime police being established on her own subjects, except by persons belonging to her own country.

The practical difficulties in the way of ascertaining the nationality of the vessel were insisted upon by the English

Government; but the Americans refused, and refused successfully, to admit this as any ground for departure from the rule of law. In the same debate Lord Malmesbury (p. 2089) said, without objection:—

> The American Government assert that they had a right to maintain their own police, and that, whatever might be on board a vessel, if the American flag was flying we had no right to visit it. They said that they constantly carried out a visitation by their own police, and that they would not be meddled with by any other country.

This being the state of the law as to the *right* of the case, the position of the cruiser is no doubt a difficult one, as is pointed out by Lord Aberdeen (p. 2081). If he visits a ship which he suspects of carrying false colours he does so at his own risk. As Lord Aberdeen says, 'If it should turn out that the vessel is an American, and has a right to use the flag suspected, he must, of course, apologise for his acts and make ample compensation for any injury done.' And he likens it to the case of a writ where the officer arrests the wrong man.

At the same time that the English Government made a formal abandonment of the claim of visitation, they announced that they had commenced negotiations both with the French and the American Governments in order to settle some plan and draw up instructions which should meet this difficulty and prevent the fraudulent use of international flags. This, of course, was only a matter of mutual agreement, the claim of right being withdrawn. In 1858 the American Government expressed their willingness to 'listen to and consider any suggestions' on this point. What was the result of those negotiations I am not aware.

It has been asked whether there has been any alteration in the 'Instructions to Naval Officers.' What may be the present state of things under any agreement with the American Government I know not; but it is clear from the speech of Lord Malmesbury that in 1858 a very material modification of them was contemplated and even effected. The then Secretary for Foreign Affairs says (p. 2089):—

> The noble Earl (Aberdeen) has asked whether I have altered those instructions. I have not done so. They remain precisely as they were. But I do not think they are so safely worded as they might be, and I think that they might be improved so as not to expose our officers to the risk of making

mistakes which amount to an infraction of international law, and which place them in an unfair position, such as no officers, and especially young officers, ought to occupy. Pending the arrangement I have sketched out, that English cruisers should search suspected English vessels, and that Americans should search suspected American vessels, and that French cruisers should search suspected French vessels, *without actually altering the instructions heretofore acted upon, we have thought it right to suspend them until the negotiations have proceeded further. We have also ordered our cruisers on that coast to respect the American flag under any circumstances.*

It will be seen from this passage, that, not only in principle, but in practice, the right was absolutely abandoned to visit an American vessel, except by the express consent of her own Government. Whether any subsequent understanding has been come to between the two Governments on this subject, I am not aware. My only object at present is to ascertain the rights of the several parties by the general Law of Nations, and to show that the American Government had not, as has been supposed, on former occasions, questioned that right of belligerent search which it now claims to exercise.

The belligerent right of search is a totally different thing. Neither America nor any other nation has disputed or disputes it. And it is not for us to blunt an instrument, or rather to destroy a shield, which we have employed, and shall employ again, whenever we have the misfortune to be at war. Honesty and prudence alike forbid such a course.

The propositions I have stated are so simple and so elementary, that it is incredible how they should be called in question. I will venture to say, that there is no English naval officer who is so ill instructed in his duties as to have meditated the conduct which is gratuitously attributed to the commander of the 'Leopard.' However, as the paragraphs which are 'going the round of the papers' show that the public mind is not very accurately informed on these topics, I have thought it right to trouble you with this letter.

SOME EXTRACTS FROM

LETTERS ON THE AFFAIR OF THE 'TRENT'

AND

MR. SEWARD'S DESPATCH.

LETTERS ON THE AFFAIR OF THE 'TRENT' AND MR. SEWARD'S DESPATCH.

THE following extracts are taken from several letters published at the time of the affair of the 'Trent.' They are not reprinted *in extenso*, as many of the topics to which they referred, such as the supposed precedents of 'H. Laurens' and 'Lucien Buonaparte,' are now settled, and have ceased to have any general interest. The following passages deal with the essential characteristics of contraband entitling to seizure.

I.

THE ESSENTIALS OF CONTRABAND OF WAR.

EVERY man must unfeignedly rejoice that the imminent dangers which had grown out of the affair of the 'Trent' have been averted by the practical compliance of the American Government with the English demand. Nevertheless, the despatch of Mr. Seward, published in the *Times* of this morning, contains the assertion of doctrines which, if taken as the authoritative expression of the views of the American Government, and acted upon as such by their naval officers, will certainly reproduce complications not less dangerous and embarrassing than that which has just been with so much difficulty disposed of.

I do not propose to trouble you with a lengthened discussion of the numerous legal mistakes with which Mr. Seward's despatch abounds; but there is one error so fundamental in its nature, and so capital in its consequences, that not a moment should be lost in exposing its fallacy. Mr. Seward divides his discourse into five principal heads. Under the first head he professes to demonstrate that the captured Commissioners were clearly 'contraband' of war. Without being able to agree

either to his statements or his reasonings on this point, I am content for the present purpose to assume that he is right. But then, under the second head of the inquiry, I find this remarkable sentence:—

> I assume in the present case, what, as I read in the British authorities, is regarded by Great Britain herself as true maritime law, that the circumstance that the 'Trent' was proceeding from a neutral port to another neutral port does not modify the rights of the belligerent Power.

Now, if all that Mr. Seward here means is that the right of search may be exercised by a belligerent, whatever may be the destination or point of departure of the neutral ship, he is unquestionably right; but if he intends to assert that the neutral destination of the ship has no effect on the question of contraband, he is just as undoubtedly wrong. In a question of contraband, the destination of the ship is everything. Going to a belligerent port, some goods may be and some may not be contraband. But, going bonâ fide to a neutral port, no goods are, or can be treated as, contraband. What 'British authorities' Mr. Seward may have 'read,' I cannot pretend to say, but I can supply him with what is 'regarded by Great Britain,' and I believe by every nation in the world, 'as true maritime law,' in the simple and decisive words of Lord Stowell:—

> This is a claim for a ship taken, as it is admitted, at the time of capture sailing for Embden, a neutral port—a destination on which, if considered as the real destination, no question of contraband could arise; *inasmuch as goods going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful.* (Case of the 'Imina,' 3 Robinson's *Reports*, p. 167.)

And this is, and always has been, the simple and conclusive answer to the American case. Conceding to them (which might well be disputed) that the persons captured might have been treated as 'contraband' if on their way to a belligerent port, the fact of their real and bonâ fide neutral destination would have been a complete defence before a prize court, even if they had been taken before such a court by Captain Wilkes. The law on this point is stated with perfect accuracy and clearness in M. Thouvenel's despatch:—

> There remains, therefore, to invoke, in explanation of their capture, only the pretext that they were the bearers of official despatches from the enemy; but this is the moment to recall a circumstance which governs all

this affair, and which renders the conduct of the American cruiser unjustifiable. The 'Trent' was not destined to a port belonging to one of the belligerents; she was carrying to a neutral country her cargo and her passengers, and, moreover, it was in a neutral port that they were taken.

It is the entire failure of Mr. Seward's despatch to meet or deal with this capital blot in his case that constitutes the fatal vice of his argument.

How very imperfectly Mr. Seward is acquainted with the legal questions of which he treats appears from the following passage:—

> The law is so very liberal in this respect that when contraband is found on board a neutral vessel, not only is the contraband forfeited, but the vessel which is the vehicle of its passage or transportation, being tainted, also becomes contraband, and is subjected to capture and confiscation.

Now, everyone in the least conversant with the question is perfectly well aware that what is here stated to be the rule with respect to the confiscation of the ship is quite the exception; and that the general principle (deviated from only under special circumstances) is that the carriage of contraband does not involve the forfeiture of the ship, but only of the cargo and the freight.

No doubt, considerable allowance ought to be made for the difficulty in which Mr. Seward is placed by the hopeless endeavour to reconcile the action of his Government in surrendering the prisoners with the vote of thanks of Congress to Captain Wilkes. If this despatch could be treated as a mere apologetic document, which was intended to have no farther results than to mask an embarrassing retreat, we might well connive at the construction of a golden bridge for a flying foe. But, unfortunately, this manifesto of the American view of international law is only too likely to be taken as 'sailing orders' by American naval captains; and if Captain Wilkes is to take his instructions from Mr. Seward's despatch, I fear he is likely to involve his country in difficulties not less serious than those which have resulted from his unassisted studies of Kent and Vattel. It is of the first importance that the American Government should be made to understand that the principles of action which this despatch professes to defend are as little justified by International Law, and will be as little tolerated in practice by maritime nations, as those which

Mr. Seward has found it expedient to abandon. England and France must make it clearly and immediately known that persons and things on board a neutral ship on its journey from one neutral port to another, are not only not subject to capture without the intervention of a prize court, but that, if brought before such a court, they cannot be made the object of legitimate condemnation.

II.

A FURTHER LETTER ON THE SAME SUBJECT.

THE practical importance of the question must be my apology for asking your indulgence while I add a few remarks to my letter of yesterday.

Mr. Seward 'trusts that he has shown that the four persons who were taken from the "Trent" by Captain Wilkes and their despatches were contraband of war.' This confidence expressed by the American Secretary of State can only be founded on the assumption that all the persons to whom his argument is addressed enjoy the same ignorance of the elements of international law with which he himself rests so abundantly satisfied. I trust I have shown, on better grounds, that the persons in question were not and could not be contraband of war. In order to constitute contraband of war, it is absolutely essential that two elements should concur—viz. a hostile quality and a hostile destination. If either of these elements is wanting, there can be no such thing as contraband. Innocent goods going to a belligerent port are not contraband. Here there is a hostile destination, but no hostile quality. Hostile goods, such as munitions of war, going to a neutral port are not contraband. Here there is a hostile quality, but no hostile destination. Mr. Seward thinks he has done all that is necessary to establish that the four persons taken in the 'Trent' were contraband of war when he has shown that they partook of a hostile quality; but he seems ignorant that, in establishing this point, he has only proved half his case, and that, if he cannot demonstrate that they had also a hostile destination, he has wholly failed to fix them with the character of contraband of war. But, so far from his having been able to establish this, the proof is exactly the other way; and the unquestioned and unquestionable neutral destination of the 'Trent' proves beyond all possibility of cavil that neither persons nor goods on board

of her could be treated as contraband. From the moment that Captain Wilkes had ascertained—as he was entitled to ascertain—the real destination of the 'Trent,' if he was satisfied that that destination was really neutral, he had no longer any right whatever to detain either the ship or any thing or person on board of her. He had no more right to carry her to New York for adjudication, than he had to seize the persons on board of her without any adjudication.

The great and practical danger of the fallacious reasonings of Mr. Seward consists in this, that they would serve to justify, and may be taken to encourage, the captain of the 'Tuscarora' to seize the Dover packet-boat and carry her into New York for adjudication, in case Messrs. Mason and Slidell should take a through ticket from London to Paris. If the principles of the American despatch are sustainable at all, the Dover packet would be unquestionably liable to seizure, and ultimately subject to confiscation. Now, I venture most confidently to affirm that a captain of a man-of-war who should, without any reasonable or probable cause for doubt as to the neutral destination of a merchant vessel, vexatiously detain and carry that vessel before a prize court for adjudication, as a vehicle of contraband, would commit a gross breach of international comity, which would properly become the subject of diplomatic complaint. That such a vessel cannot be charged with the unlawful carriage of contraband, whatever may be her cargo, is a point of international law so clearly settled and so universally established that no nation can be permitted to treat it as a doubtful matter. If Captain Wilkes had taken the 'Trent' to New York for adjudication without being able to show that he had any grounds for suspecting that she had only colourably assumed a neutral destination, the act of detention would in itself have been so wanton and unjustifiable an invasion of the immunity of neutral ships trading to neutral ports, that the English Government would have been entitled to complain of it as a vexatious and unwarranted proceeding. If—which it is impossible to conceive—an American prize court should have exhibited an ignorance or a contempt of law equal to that displayed in Mr. Seward's despatch, and condemned the vessel, so gross a violation of the settled principles

of the Law of Nations by the tribunal appointed to guard its sanctions would have been in itself a justifiable cause of war.

It is only in doubtful or suspicious cases that a captain of a man-of-war can be justified in the detention and capture of a vessel, even though he should afterwards submit the question to the adjudication of a prize court. The compensation which such a court can award may be very inadequate to the mischief which has been done by an act of vexatious and causeless molestation. The great maritime nations of England and France cannot afford to have the leading principles of international law confounded by the loose inaccuracies of Mr. Seward. They cannot suffer their trade to be embarrassed and their interests compromised by the American navy acting upon instructions of which every line is a blunder. No time should be lost in putting forth an official protest which shall reassert the true doctrines of maritime law in opposition to this most foolish performance; for otherwise, with Sewards for teachers and Wilkeses for pupils, there is no saying how soon we may not have another 'Trent affair' on our hands.

Note.

The doctrine as to the essentials of contraband of war laid down in the preceding letters was amply confirmed by the high authority of the despatch of Lord Russell, in reply to Mr. Seward, which was subsequently published. The following passage will be found in that despatch:—

> It is of the very essence of the definition of contraband that the articles should have a hostile, and not a neutral, destination. 'Goods,' says Lord Stowell, 'going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful. The rule respecting contraband,' he adds, 'as I have always understood it, is, that articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port.' On what just principle can it be contended that a hostile destination is less necessary, or a neutral destination more noxious, for constituting a contraband character in the case of public agents or despatches, than in the case of arms and ammunition?

III.

THE following is an extract from a letter upon a speech delivered by Mr. C. Sumner, professing to expound and to maintain the doctrines of Mr. Seward's despatch, and to prove that England, in demanding the surrender of the persons captured on board the 'Trent,' had departed from the principles she had previously maintained.

LETTER ON MR. SUMNER'S SPEECH.

The main object of Mr. Sumner's oration is to prove that the surrender of Messrs. Slidell and Mason is a great triumph for the American Government. There is proverbially no accounting for taste, and if the American people are of Mr. Sumner's opinion I do not see why we should complain of their contentment. Some people, like Uriah Heep, are 'very umble,' and their meekness is an edifying spectacle. We demanded the restoration of the prisoners, not in order to mortify the American people, but for the purpose of vindicating the honour of our flag, and asserting the established principles of maritime law. If, therefore, Mr. C. Sumner had confined himself to the assertion that in the surrender of the Southern Commissioners the American Government had done just what they always from the first intended to do, and that nothing could give them greater satisfaction than the opportunity of illustrating their own maxims in so conspicuous an instance, we should have welcomed the assertion with that civility to which its obvious sincerity and truth would have entitled it. Nothing could be more agreeable than a conclusion which left both parties equally satisfied.

Unfortunately, however, for himself, Mr. Sumner has not seen the wisdom of restricting himself to statements which, however unfounded in fact, it is no one's interest or business to confute and expose.

In the surrender of the prisoners, says Mr. Sumner, 'our

Government does not even stoop to conquer.' 'It simply lifts itself to the height of its own original principles.' 'Here is a victory of truth.' 'The early efforts of our best negotiators, the patriot trials of our soldiers in an unequal war, have at length prevailed.' 'The United States has secured the triumph of its cherished principles.' This is all very fine. But may I be permitted to ask, if this coy damsel did not need to 'stoop to conquer,' why was she so long about the conquest? Why did the American Government take six weeks to raise itself to the height of its original principles? Why did not Mr. Seward disavow the act of Captain Wilkes as soon as it came to his knowledge? Why did the 'victory of truth' require for its accomplishment a reinforcement of British infantry? How came the American Foreign Minister to say that if there had been any convenience in such a course, he would certainly have awarded the 'victory' to that which is not 'the truth,' but its opposite? If the American Government were so intent on 'securing the triumph of their cherished principles,' how came they to make the slight mistake of 'securing' the prisoners instead, in the prison at Boston? Are the 'cherished principles' of the American Government so little known to their statesmen that they required to be reminded of them by the English Minister—not to say by the English fleet?

But, not satisfied with claiming the affair of the 'Trent' as an American triumph, he must forsooth go on to prove it a British humiliation. England is a 'penitent power.' 'The champion of belligerent rights has 'checked his hand and changed his pride.' 'The most offensive pretensions that ever stalked on the waves are driven off.' 'Great Britain, usually so haughty, invites us to practise those principles which she has so strenuously opposed.' 'Her late appeal can be vindicated only by a renunciation of early, long-continued tyranny.' And much more rubbish to the like effect. Now, without noticing the extreme offensiveness of the tone of these remarks, it is sufficient to say that the substance of these statements is a direct misstatement of the truth. In demanding the surrender of the prisoners, England has had nothing to recant. She has not withdrawn, and had no occasion to

withdraw, any pretension she has ever asserted or acted upon. She has not invited the American Government to practise anything which she has ever opposed. In order to 'vindicate her late appeal,' England has had nothing to renounce that she has ever claimed.

Permit me to make this clear beyond any possibility of doubt. Mr. Seward has placed the pretension of the American Government to seize the Southern Commissioners on the footing of a belligerent right. He has distinctly stated in his despatch that his Government regards an Ambassador from a belligerent power, on his way to a neutral port, liable to capture on board a neutral vessel as contraband of war. The English Government, and the whole civilised world, repel so monstrous a proposition. In making this remonstrance against such a doctrine, has England anything to recant or renounce? In the case of the 'Caroline,' the English Court of Admiralty expressly decided that a neutral vessel might lawfully carry such a person. I have already pointed out that, in order to constitute contraband of war, a hostile quality and a hostile destination must concur. But here both elements are wanting. The character of Messrs. Slidell and Mason was in itself innocent, and their destination was distinctly neutral. In claiming their restoration, therefore, we found ourselves upon principles which are nowhere asserted with greater clearness than in English authorities, and which have been consistently respected in English practice. We ask nothing which we have ever ourselves denied — we are making no claim the validity of which we have ever questioned.

As if to make the absurdity of his position more conspicuous, Mr. Sumner invokes the sympathies of 'Continental Governments' for the doctrine of Mr. Seward's despatch. That the American Secretary of State should venture to question the validity of principles so clearly established, and so universally practised, is astonishing enough. But that, while he asserts pretensions which the haughtiest belligerent has never yet dreamt of putting forth, he should claim the title of champion of neutral rights, is an extremity of — shall I call it simplicity or impudence? — which even American politicians have hardly yet permitted themselves. I imagine that before very long the public will have an opportunity of

learning what sort of welcome this original vindication of neutral rights has received—I do not say from the 'penitent' authorities of Great Britain, but from those 'Continental Governments' whose sympathies he confidently invokes. I shall be glad to hear how far 'estranged sympathies abroad' will have been conciliated by the 'open adhesion' of the American Government to the 'principle' that a neutral ship trading to a neutral port may be lawfully condemned as a vehicle of contraband.

I know not whether, in a confusion of mind, Mr. Sumner has imagined to himself that the seizure of Messrs. Slidell and Mason is a parallel case to the instances of impressment of seamen out of which grew the war of 1812. Yet men of less pretensions than the 'Chairman of the Committee of Foreign Relations' ought to be aware that the cases are not only not the same, but not even similar. Their resemblance, at most, extends to the proverbial identity of chalk and cheese. Mr. Seward claims to be entitled to seize the persons of the Commissioners in the exercise of a belligerent right, and to treat them as contraband of war. He suggests no other ground; he makes no other case. In the instance of the impressment of seamen, Great Britain claimed to exercise, not a belligerent, but a municipal right; and it is needless to say that she did not regard her own sailors as contraband of war. The two cases, then, have simply nothing to do with one another. In denying the doctrine of Mr. Seward we do not re-affirm, still less do we withdraw, the pretensions of 1812. We merely leave it on one side as wholly irrelevant to the present question. If the claim of impressment was sustainable then, it is sustainable just as much after the demand for the restitution of the Southern Commissioners as before, because their capture raises a wholly different dispute. If our pretension on that head was questionable in 1812, it is questionable now; but it is wholly unaffected by a transaction which in no manner or sort touches it at all. I venture emphatically to affirm that, whatever course policy may dictate or prudence suggest, the English Government is legally at liberty to enforce every pretension to which she has ever laid claim just as much after the affair of the 'Trent' as before it. In claiming the restitution of the prisoners, Great

Britain contradicts nothing she has ever asserted—she surrenders nothing to which she has ever pretended; she only affirms principles and asserts rights which she has been always ready to recognise and prepared to maintain.

A PAPER ON THE

TERRITORIALITY OF THE MERCHANT VESSEL.

THE TERRITORIALITY OF THE MERCHANT VESSEL.

In one of the most exquisite pieces of logical irony which has seen the light since the *Provinciales* of Pascal—I mean the *Sophismes Economiques* of Frederic Bastiat—that witty writer, in all the impatience of outraged common sense, puts up to Heaven the fervent prayer, 'God preserve us from metaphors.' Heaven, unhappily for the human race, has not yet been pleased to hearken to the prayer of M. Bastiat, and we are cursed, to the third and fourth generation, for the superstition and folly of those who worship images. Images are pestilent enough in the domain of politics and of religion, but nowhere is their intrusion more noxious than in the sanctuary of law, which ought to cultivate the spirit of reason. I propose to devote a few remarks to a favourite Dagon of the high priests of the Armed Neutrality. There are few images which have exercised, and still do exercise, a more pernicious influence in the department of International Law, than the metaphor which, by a vicious and false analogy, converts the neutral merchant vessel into an integral portion of the neutral territory. M. Hautefeuille, as might be expected, is very large on the subject of the 'territoriality' of the merchant vessel. A writer who never fails to adopt an erroneous idea, and to improve upon it, was not likely to omit so favourable an opportunity of engrafting on his works a radically untrue conception.

To trace an error to its source is not unfrequently the best method to eradicate it. Let us hunt this unhappy metaphor to its *cunabulum*. If I am not mistaken, its birth, parentage, and education will be found in the notorious *Exposition des Motifs* put forth in 1752 by the Prussian lawyers to justify the confiscation, as against the English creditors, of the Silesian loan. The history of this discussion is one of the most notable epochs

in the story of jurisprudence. From that time to this, the publicists of Europe have been divided into two camps, as different in spirit and in principle as the Nominalists and Realists, the Thomists and the Dunses of the middle ages, or the Jansenists and the Jesuits of the last century. The document of the Prussian lawyers, and the reply of the English jurists, are both representative performances, symbolising two schools, which have since, with very unequal merits, divided the literature of maritime jurisprudence. Every student of International Law should reperuse them again and again; for on the one side they embrace the quintessence of error, and on the other they present the best model of reason and common sense which can be proposed to a juridical writer. Who the author of the Prussian *Exposition* was, I have nowhere seen precisely stated, though I suspect it must have been Samuel de Cocceii — a man, no doubt, of ability and of learning in his own departments of law, but by no means the equal of his more celebrated father, Henry Baron de Cocceii, the learned commentator on Grotius. The English answer was the work of men whose capacity and knowledge have never been surpassed —they were Lee, Park, Ryder, and Murray. It is highly probable that this masterly performance was penned by the junior signatary, William Murray, the Solicitor-General. As the Prussian *Exposition* contains the germs of almost all the errors which ripened in time into the full-blown sophisms of Hübner, and still effervesce in the paradoxes of M. Hautefeuille, so the English reply condenses in an unanswerable refutation the true principles of legal ratiocination. The Prussian paper will be found in vol. ii. of Martens' *Causes Célèbres*, Cause Première. The English counter-opinion is printed in the original in the *Collectanea Juridica*, vol. ii. No. V. It is impossible to convey by extracts the scope and effect of this memorable discussion. To give, however, a brick of the Prussian edifice as a sample, I may mention that this egregious performance absolutely denies the right of a belligerent Power to decide on questions of prize in its own Admiralty courts. To another proposition of the Prussian lawyers, the English reply gives the only possible answer in the following words:—

> However, the contrary is too clear to admit of being disputed. It may be

proved by the authorities of every writer on the law of nations. It may be proved by the constant practice, ancient and modern; but the general rule cannot be more strongly proved than by the exceptions which particular treaties have made to it.

In this simple formula is contained the complete and universal answer to the whole work of M. Hautefeuille and the school of which he is one of the most conspicuous examples. Of this unrivalled English exposition of the law of nations the testimony of Montesquieu stands recorded, '*C'est une réponse sans réplique.*' The relative superiority of the one argument over the other remains to this day what it was a century ago. Unhappily, though there are *Expositions* enough in the field, the Mansfields are not forthcoming to deal to them the justice they deserve. The head of the Hydra was fairly lopped off, but it has sprouted forth ever since in a perpetual succession of Hübners, Klübers, and Hautefeuilles.

The *Exposition des Motifs* is just such a production in point of justice and profundity as might have been expected to see the day under the patronage of that enlightened monarch who was the plunderer of provinces and the bosom friend of Voltaire. In this congenial *nidus* the egg of this unfortunate metaphor was hatched. At p. 25 of Martens' collection will be found the following passage in the *Deuxième Question* of the *Exposition*:—

> Or les vaisseaux prussiens, quand ils auraient été chargés des effets appartenant aux ennemis de l'Angleterre, *étaient un lieu neutre*, d'où il s'ensuit qu'il *est parfaitement égal d'enlever ces effets des dits vaisseaux ou de les enlever sur un territoire neutre.*

This monstrous fiction, so invented for the specific purpose of denying the right of seizure of enemies' goods, without a shadow of truth or propriety, has passed current in a certain school of writers from that day to this; over and over again it has been refuted, exposed, and exploded by demonstrations which admit of no reply; and again and again, like a bad shilling, it passes into circulation to the great delusion of mankind. As this is really the keystone of the edifice of the Armed Neutrality, which M. Hautefeuille is so eager to revive, it may be worth while to devote a little space to its refutation, for the thousandth time.

In the first place, it will be seen at once that it is a meta-

phor invented for a particular purpose, viz., that of overthrowing the long-established right of belligerents to seize enemies' property on board neutral vessels. It is the most exquisite example of arguing in a circle that can possibly be conceived. The object is to prove that neutral vessels are inviolable. For this purpose a similitude is attributed to them to which their only resemblance consists in their inviolability. Why are neutral ships to be called part of the neutral territory? They are not dry land; they are not stationary; they have none of the qualities of territory, except it be that of inviolability, and therefore the metaphor assumes the very thing which it is intended to prove. This may be ingenious, but it is certainly not logical. Those who choose to compare things to what they are not because they somewhat resemble them, may, if they please, term a neutral ship of war at all times, or a merchant vessel in time of peace, part of the neutral territory, because they enjoy some of the immunities which belong to such territory. But to say of the neutral merchant vessel in time of war, that it is like the neutral territory, is to compare it to a thing to which it has absolutely no more likeness than Hamlet's cloud to the weasel or the whale. Instead of its being true that it is inviolable, because it is like the neutral territories, the real truth is that it is not like the neutral territory because it is violable.

I will quote a few authorities from writers of various nations who have exposed this fallacious mischievous metaphor. The first I shall cite is Lampredi, a jurist of great learning and acuteness, whose neutral *habitat* places him beyond the suspicion of partiality. It may be interesting to some of your readers who are not acquainted with the writings of the Pisan Professor, and who may not be proficient in Italian, to know that there is a good French translation of his celebrated treatise. In section x. he has dealt at large with this delusive image which had been reproduced by Hübner. The passage is too long to quote *in extenso*. I take the following abridgement of the argument from Mr. Reddie:—

The third argument, continues Lampredi, to which the authority referred to (i.e. Hübner) has recourse, has no greater force, and may be reduced to the following syllogism:—

The merchandise and goods of enemies are not liable or subject to be legitimately captured as a prize, when they are in a neutral and friendly place.

But neutral vessels are a neutral and friendly place.

Therefore the goods of neutrals cannot be captured as prize, when they are on board neutral vessels; since, says he, it is the same thing precisely to seize them as prize on board a neutral vessel, as when situated in a neutral territory; along with which he goes on to explain that under the denomination of place, the same thing is understood as territory.

The second proposition is entirely false; and therefore the consequence deduced, or conclusion, is also false. It is not true that a small body of men, who navigate the deep sea—that is, who are in a territory not subject to the jurisdiction of anyone—ought to be considered or reputed as in the territory of that nation whose flag they hoist; and yet Hübner asserts this gratuitously, and without the least proof. The flag, when it is accompanied by the sea papers or documents in regular form, serves no other purpose than to show the nation to which the navigators or crew belong, and from which they have departed with the public permission of sailing and of hoisting the flag of their nation; in other respects, and with regard to the other strangers whom they meet, they are simply individual men, who, in relation to these strangers, have no other law to observe than that of nature, and in addition that which their sovereign has prescribed to them with regard to the conduct which they ought to observe in relation to foreigners whom they meet on the open sea.

Two vessels which meet each other in open sea do not materially differ from two wagons found in a desert not occupied by anyone. And as it would be ridiculous for one of them to pretend to be regarded as a territory, for example, the Venetian, because it carried, raised on a spear, the arms of the Republic, so it is equally ridiculous for a wagon or carriage at sea to pretend that, by hoisting a flag with the arms of a nation, it must be considered as part of its territory, and is, therefore, inviolable. The men who are found in it are inviolable; but by reason of the law of nature which renders them free and independent of all except their legitimate sovereign, not by reason of their flag, which cannot cause men who are, in fact, actually in a territory which belongs to no one, to be regarded as in a territory belonging to their sovereign. And, although it may be true that the sovereign takes cognizance of acts of violence and injustice committed against his subjects when sailing on the high seas, and demands, and even by armed force exacts reparation, he does this not in virtue of a right to resist or repel an invasion of his territory, but in consequence of the general obligation under which he is to defend his subjects from every violence, internal and external, and to procure reparation of the loss which they have thereby sustained.

Nevertheless, some have carried so much farther this strange opinion, which arose in times when nations deemed themselves absolute masters of immense tracts of the vast oceans, as to have come to believe and maintain that ships of war, in particular, ought to be reputed part of the territory of the nation whose flag they hoisted, not only in the vast waters of the sea which

do not admit of occupancy, but also in those waters which admit of such occupancy, and also when they have cast anchor in the ports, roadsteads, bays, or creeks of foreign nations. But this is most false or erroneous, for in the territory of a State there is neither person nor place over which the sovereign does not exercise the supreme power; nor does the quality of the carriages or vehicles in which foreigners, within the boundaries of the territory, nor their number, alter in the slightest degree the right of the sovereign.

The nation to which the persons on board the vessel belong, as subjects, may declare that the vessel shall be held to be its territory, with regard to all the acts or deeds of these individuals, which are to have validity in their native country, to the effect, that donations, testaments, and other transferences of property, shall have force and validity in the country of the donor, testator, &c.; but never to the effect of withdrawing or releasing the people of the vessel from the jurisdiction of the sovereign of the place where she lies, or stops, or is stationed.

The other illusion may have its origin in sometimes observing, that on board ships of war which are lying in those parts of the sea, which admit of appropriation, and are consequently within the territory, the rights which belong to the supreme power are sometimes exercised by the commanders even to the extent of inflicting punishment. Hence some persons inconsiderately infer that the vessel is a foreign territory. But this illusion disappears as soon as we reflect that this exercise of jurisdiction is not founded upon the law of territory, but upon the nature of military command, which is understood to remain untouched, and in full vigour, as often as the sovereign of the place consents to receive a ship of war as such. Such a ship of war cannot exist and be governed without the perpetual duration of military command, which consequently continues to be exercised in all its extent within the vessel, more in virtue of the concession of the prince who receives the ship than from any right on the part of the captain, much less in virtue of any territorial right.

Mr. Reddie gives his own opinion of this doctrine in the following words: —

In point of fact, this rule of the new system is a mere *fictio juris*; whereas fictions are acknowledged by the most eminent international jurists to be unknown and inadmissible in the natural law of nations. It goes upon a hypothesis, or supposition, inconsistent with physical fact with the actual state of matters on the face of this globe, upon which all human law, all rights and obligations, susceptible of enforcement, must and do proceed. It assumes, contrary to the fact, that a merchant vessel, or boat, or even a piece of cloth, a flag, in the open sea or wide ocean, are physically identical with, or equivalent to, and ought to be viewed in the same light, and to have the same practical effect in law, or in that branch of morals which admits of physical enforcement, as a portion of a continent, an island, or fixed and stable land occupied by a tribe, a community, a people, or nation, as its territory.

Let us hear on this subject Azuni, the most vehement champion of neutral rights : —

Nor is there any more solidity in the gratuitous assertion of Hübner, made without the least proof, that a ship on the high sea ought to be considered as a part of the territory of the sovereign whose flag she bears; that she ought, consequently, to be inviolable; and that to seize goods found on board of her is the same thing as to plunder them on neutral territory.

I forbear to demonstrate the falsity of the principle on which the doctrine of Hübner is founded, that the place occupied by the vessel is to be considered as part of the territory of the sovereign whose flag she bears. The flag, with the passport and charter-party, prove only to what country she belongs. This point has already been sufficiently discussed in the first volume of this work (chap. ii. art. 7, s. 2). I shall confine myself to a single observation on the opinion of this writer—that, if it was founded on reason, it would be equally unlawful to seize warlike stores and goods, contraband of war and provisions, destined for places besieged or blockaded, when carried by a neutral vessel. Yet all the writers on public law, and Hübner himself, are of a different opinion. The immunity of the flag which this author supposes, without any plausible reason, to be the same as that of the territory, proves nothing, therefore, in favour of the liberty of neutral commerce in the sense of the argument here stated.—*Azuni*, Part II. cap. iii. s. 8.

Passing from the Italian writers, let us see what one of the most sensible of the French publicists says on this head. The following passage is from M. Ortolan : —

Mais ce que nous avons dit des bâtiments de l'état mouillés même dans les eaux d'un pays étranger, peut-on l'étendre aux bâtiments de commerce ? Peut-on dire de ces bâtiments que partout où ils se trouvent, ils sont la continuation du territoire de la nation dont ils portent le pavillon et aux citoyens de laquelle ils appartiennent? Quelques écrivains semblent dire oui; beaucoup restreignent la maxime et ses conséquences au seul cas déjà mentionné par nous, celui où le bâtiment de commerce est en pleine mer. Si dans ce cas, en effet, la vérité de cette maxime est un corollaire évident de la liberté des mers, elle ne peut plus recevoir une application aussi étendue dès que le navire marchand se trouve en deçà des limites maritimes d'une puissance étrangère; car dès-lors, il ne jouit plus d'une inviolabilité pleine et entière. Les perquisitions de la douane, auxquelles il est assujetti, les gardes de douaniers que l'étranger pose à son bord, constituent déjà à elles seules une violation de territoire, et le territoire est inviolable.

Nous croyons, en effet, que les navires de commerce n'étant pas bâtiments de l'état, ne portant pas en leur sein une partie de la puissance publique de leur pays, un corps organisé de fonctionnaires ou d'agents militaires ou administratifs, dès qu'ils entrent dans les eaux d'un peuple étranger, le conflit de souveraineté à souveraineté, dont nous avons parlé quant aux bâtiments de guerre, n'existe pas, quant à eux, au même degré. La souveraineté du pays dans les eaux duquel ils se trouvent ne rencontre pas directement,

comme point d'arrêt et comme garantie internationale à leur bord, la souveraineté de leur propre pays. D'où il suit que ces navires particuliers, bien qu'ils restent régis, pour ce qui concerne exclusivement leur régime intérieur, par les lois de leur pays, ne sauraient être soustraits entièrement à l'action de la puissance publique du territoire sur lequel ils sont, pour l'exécution des lois de police et de sûreté et autres lois générales de cette nature en vigueur sur ce territoire.

On ne peut pas dire de ce navire que tous les faits qui se passent à son bord sont régis comme s'ils s'étaient passés sur le territoire de l'état auquel le navire appartient. Il faut distinguer entre ces faits : pour les uns la règle est vraie, pour les autres elle ne l'est pas. Ou, en d'autres termes, les navires de commerce jouissent, pour certains faits, du bénéfice de l'exterritorialité, et pour des autres, ils n'en jouissent pas.

La distinction entre le cercle presque illimité des franchises des navires de guerre et celui, beaucoup plus restreint, des navires de commerce, non-seulement existe dans la coutume, mais elle est positivement établie par les clauses d'un grand nombre de traités de commerce et de navigation. On la trouve notamment indiquée d'une manière bien nette, à l'occasion des refugiés à bord, dans les articles 3 et 26 du traité conclu le 30 juillet 1789, entre le Danemarck et la république de Gènes. (Vol. i. 230—233.)

The matter is thus dealt with by the American authorities. The following passage will be found in Wheaton's *Elements* : —

In respect to *private* vessels, it has been said the case is different. They form no part of the neutral territory, and when within the territory of another state are not exempt from the local jurisdiction. That portion of the ocean which is temporarily occupied by them forms no part of the neutral territory, nor does the vessel itself, which is removable, the property of private individuals, form any part of the territory of that power to whose subjects it belongs. The jurisdiction which that power may lawfully exercise over the vessel on the high seas is a jurisdiction over the persons and property of its citizens; it is not a territorial jurisdiction. Being upon the ocean, it is a place where no particular nation has jurisdiction, and where, consequently, all nations may equally exercise their international rights.

But perhaps the argument is nowhere better stated than in a despatch by the American Envoys in Paris in 1798, the admirable argument of the whole of which paper I commend to the careful study of M. Hautefeuille : —

It follows, then, that the rights of England being neither increased nor diminished by compact, remained precisely in their natural state, and were to be ascertained by some pre-existing acknowledged principle. This principle is to be searched for in the law of nations. That law forms, independent of compact, a rule of action by which the sovereignties of the civilised world consent to be governed. It prescribes what one nation may

do without giving just cause of war, and which of consequence another may and ought to permit without being considered as having sacrificed its honour, its dignity, and independence.

What, then, is the law of nations on this subject? Do neutral bottoms of right, and independent of particular compact, protect hostile goods? The question is to be considered in its mere right, uninfluenced by the wishes or the interests of a neutral or belligerent power. It is a general rule that war gives to a belligerent power a right to seize and confiscate the goods of his enemy. However humanity may deplore the application of the principle, there is perhaps no one to which man has more universally asserted, or to which jurists have more universally agreed. Its theory and its practice have unhappily been maintained in all ages. The right, then, may be exercised on the goods of an enemy wherever found, unless opposed by some superior right. It yields by common consent to the superior right of a neutral nation to protect by virtue of its sovereignty the goods of either of the belligerent powers found within its jurisdiction. But can this right of protection, admitted to be possessed by any Government within its mere limits in virtue of its absolute sovereignty, be communicated to a vessel navigating the high seas?

It is supposed that it cannot be so communicated, because the ocean, being common to all nations, no absolute sovereignty can be acquired on it. The rights of all are equal, and must necessarily check, limit, and restrain the other. The superior right, therefore, of absolute sovereignty to protect all property within its own territory ceases to be superior when the property is no longer within its own territory, and may be encountered by the opposing acknowledged right of a belligerent power to seize and confiscate the goods of his enemy. If the belligerent permits the neutral to attempt without hazard to himself thus to serve and aid his enemy, yet he does not relinquish the right of defeating that attempt whenever it shall be in his power to defeat it. Thus it is admitted that an armed vessel may stop and search at sea a neutral bottom, and may take out goods which are contraband of war, without giving cause of offence or being supposed in any degree to infringe neutral rights. But this practice could not be permitted within harbours and rivers, or other places of a neutral where its sovereignty was complete. It follows, then, that the full right of affording protection to all property whatever within its own territory which is inherent in every Government, is not transferred to a vessel navigating the high seas. The right of a belligerent over the goods of his enemy, within his reach, is as complete as his right over contraband of war; and it seems a position not easily to be refuted that a situation which will not protect the one will not protect the other. A neutral bottom, then, does not of right, in cases where no compact exists, protect from his enemy the goods of a belligerent power. To this reasoning the practice of nations has conformed, and the common understanding of mankind seems to have assented. (*Letter of American Envoys at Paris to M. de Talleyrand*, Jan. 17, 1798.)

I will end with two English authorities. The first is taken from Mr. Manning's excellent *Commentaries*: —

It remains to consider one more position, which has been much relied on by writers who have claimed that the flag of a neutral shall protect the goods of a belligerent. The argument is based on the fact, that a belligerent has no right to capture the property of his enemy when in the territory of a neutral. It is asserted that a ship is part of the territory of the state to which she belongs, and that goods on board a neutral ship are therefore as exempt from capture, as if they were actually in the neutral country itself. To argue that a neutral ship is neutral territory is a fiction so palpable, that it appears surprising that it should ever have been insisted on as a tenable position, especially as only one argument is adduced in support of this *territoriality* of ships at sea. The jurisdiction of the State to which a ship belongs extends to the cognizance of acts committed in that ship while at sea; and it is argued, that this continuance of jurisdiction proves that a ship at sea is part of the territory to which she belongs. This deduction seems, in the first glance, far-fetched, and too flimsy to be made the basis of any serious conclusions. But more than this: it meets with contradiction on its own terms. A ship—say the assertors of this proposition—is part of the State to which she belongs, as is evident, because at sea she is subject to its jurisdiction. Now no nation has jurisdiction over the territory of another nation; but as soon as a merchant ship comes into the harbour of a State to which she does not belong, she becomes subject to the jurisdiction of this latter State. This shows that a merchant ship cannot be considered part of the territory of her State; for if she possesses this character at any times, she must possess it at all times. The fact of a ship at sea being subject to the jurisdiction of her State is a most reasonable and advantageous regulation. If not amenable to the jurisdiction of her own State, to whom would the crews at sea be answerable? And if they were amenable to no tribunal, the sea would be a place where every crime might be committed with impunity. But it is difficult to imagine how it can be deduced, as a consequence from this, that a ship is part of the territory of her State. The fiction is completely destroyed by the disproof above alleged, but other reasons combine to show how little tenable is this position. If a ship be part of her State's territory, it cannot be allowed to take from her contraband of war going to an enemy, because such capture would not be permitted if the contraband goods were lying in the neutral territory. Again, if neutral ships carry the soldiers of our enemy, it would not be allowable to make them prisoners, because we must not attack the territory of a neutral. Either the argument is worth nothing originally, or it holds to this extent, which is a *reductio ad absurdum*. To escape contradiction, the right of search and of seizing contraband must be denied, if the right to protect enemy's goods be claimed on this ground. (Manning's *Commentaries*, p. 209.)

The matter is thus dealt with in the celebrated tract of Lord Liverpool: —

I shall therefore examine the right which neutral powers claim in this

respect, first, according to the law of nations; that is, according to those principles of natural law which are relative to the conduct of nations, such as are approved by the ablest writers, and practised by states the most refined. I shall then consider the alterations which have been made in this right by those treaties which have been superadded to the law of nations, and which communities, for their mutual benefit, have established amongst themselves.

The right of protection, then, must have its foundation in some law; and, when considered in relation to any particular case, it must be founded on that law by which the interests of the parties concerned are generally determined, and which hath force in that place where the right of protection is claimed. Thus, in the present case, if neutral nations have any right to protect the property of the enemy, it must take its rise from those laws which are the established rules of conduct between nations, and particularly on that element where this right is supposed to be exerted. No civil or municipal institutions, and much less the privileges arising from them, can here take place; they have no force but under the dominion of those who agreed to their establishment. The question, then, is—how far, according to the law of nations, doth this right of protection extend? To answer this clearly, we must observe, that Governments can have succeeded to no other rights but such as their respective members enjoyed in a state of individuality; and that one nation is now to another, as it were, in a state of nature, that is, in the same condition in which man was to man before they entered society. The right, therefore, of protection which individuals would have enjoyed in such a situation is the same which Government can claim at present. An individual, then, in a state of nature would have had an undoubted right to protect his own person and property against any attack; but if I am engaged in contention with another, would he then have had a right to protect him against me? Most certainly not, since he thereby would deprive me of a right which the law of nature, for my own security, would in such a case give me—of seizing the property of this my enemy, and destroying his person. If he thought my conduct manifestly injurious, so as to call for general resentment, he would on that account become my enemy himself; but as long as he calls himself a neuter, to act in this manner against me would be no less absurd than unjust. Such, therefore, and no more, is the right of protection which Governments enjoy at present in those places to which their own dominions do not extend; they have succeeded to the rights only of their respective members, and by consequence these alone they can protect.

But it will be asked—from whence, then, arises the right, which Governments always enjoy, of protecting the property of the enemy within the precincts of their own country? It is a consequence of the right of dominion; unless, therefore, their dominion extends over the ocean, the right of protection cannot there take place. Dominion gives a right of enacting laws, of establishing new jurisdictions, and of making all (whether its own subjects or those of other countries) submit to these who come within the pale of its power. Here, then, the trial which the law of nations gives, is, as it were, superseded—and any proceedings upon it would, of

course, be unjust—but as soon as you are out of the verge of this particular jurisdiction, the laws thereof, and the privileges which attend them, cease at once, and the general laws of nations again have their force. Here the property even of an ally hath no other protection than what these laws allow it: being joined, therefore, to the goods of an enemy, it cannot communicate its protection to these, since the same law which gives security to the first allows you to seize and destroy the latter. These reasons are exemplified by a common fact. Within the precincts of the dominion of any Government you are not at liberty to search the ships of any country: but is not this liberty universally and immemorially practised over all on the main sea? And wherefore is this search made but that, according to the law of nations, all are here answerable for what they may convey?

There is something analogous to this in most civil Governments. Few countries are without some places which enjoy a right of protection from the general laws of the State, such as palaces, houses of religion, and the like; and this right generally arises from some pretence to an exclusive jurisdiction. As long, therefore, as any particular property remains within the verge of these, however justly it may be the object of the law, it is not subject to the power of it; but suppose it conveyed from hence into the public roads, beyond the precincts of this particular palace or convent, the protection it received would vanish at once, and the general laws of the community would fully then have force upon it. Thus the protection which Governments can give within their dominions extends not to the sea. The ocean is the public road of the universe, the law of which is the law of nations; and all that pass thereon are subject to it, without either privilege or exemption.

It may perhaps be thought, that to heap this mass of authority on the head of a metaphor is like breaking a butterfly on the wheel; but those who are conversant with the loose ideas and still laxer language of modern continental jurisprudence will see the absolute necessity of extirpating a vivacious and still spreading delusion.

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